

Supreme Court, U. S.  
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IN THE

# Supreme Court of the United States

October Term, 1976

No. **76-316**

JOHN R. BATES and VAN O'STEEN, *Appellants*.

V.

STATE BAR OF ARIZONA, *Appellee*.

On Appeal From The  
Supreme Court of Arizona

JURISDICTIONAL STATEMENT

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SUPREME COURT OF THE UNITED STATES  
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JOHN R. BATES and VAN O'STEEN, *Appellants*,

V.

STATE BAR OF ARIZONA, *Appellee*.

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JURISDICTIONAL STATEMENT  
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OPINION BELOW

The opinion of the Supreme Court of Arizona (App. A, *infra*)  
is not yet reported.

JURISDICTION

This is a disciplinary proceeding of the State Bar of Arizona, conducted pursuant to Rules 31 - 37 of the Supreme Court of Arizona. The final order of the Supreme Court of Arizona disciplining appellants for violating Disciplinary Rule 2-101(B) of the Code of Professional Responsibility, Rule 29(a), Arizona Supreme Court, and upholding the constitutionality of that Rule, is embodied in its opinion, which was entered on July 26, 1976 (App. A., *infra*). A notice of appeal to this Court was filed with the Clerk of the Supreme Court of Arizona on July 28, 1976 (App. B., *infra*). Jurisdiction is conferred on this Court by 28 U.S.C. 1257(2). *Lathrop v. Donohue*, 367 U.S. 820 (1961).

CONSTITUTIONAL PROVISIONS, STATUTES AND  
REGULATIONS INVOLVED

Disciplinary Rule 2-101 (B), of which the validity is in question here, is embodied in Rule 29(a) of the Supreme Court of



Arizona, Ariz. Rev. Stat. Vol. 17A, Supp. p. 23. It provides as follows:

DR 2-101

.....

(B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf. However, a lawyer recommended by, paid by, or whose legal services are furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits. This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

- (1) In political advertisements when his professional status is germane to the political campaign or to a political issue.
- (2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.
- (3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.
- (4) In and on legal documents prepared by him.
- (5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.
- (6) In communications by a qualified legal assistance organization, along with the biographical information permitted under DR 2-102 (A) (6), directed to a member or beneficiary of such organization.

The pertinent provisions of the Sherman Act are set forth in Appendix C, *infra*.

## QUESTIONS PRESENTED

1. Does a total ban upon advertising by private attorneys, enforced by an integrated state bar and state supreme court, violate the First Amendment?
2. Does such a ban, originated by the American Bar Association and incorporated into a rule of the Arizona Supreme Court, violate the Sherman Act notwithstanding the state-action exemption doctrine of *Parker v. Brown*, 317 U.S. 341 (1943)?

## STATEMENT OF THE CASE

Appellants are two members of the State Bar of Arizona who have been engaged since 1974 in a specialized law practice consciously designed to serve persons of low or moderate income — those now least served by the legal profession. Practicing as a "legal clinic", appellants have minimized the fees charged for their services by designing systems which permit paralegal personnel to perform work commonly performed by attorneys, by specializing and largely confining their practice to cases lending themselves to such systematization, and by realizing a very low profit on each case. The economic viability of their clinic consequently depends upon a relatively high volume of business. That volume in turn depends upon widespread dissemination of information concerning their clinic to a portion of the populace not generally familiar with lawyers or their fees. For that reason, appellants concluded that it was necessary to advertise.

On February 22, 1976 appellants caused to be published in the *Arizona Republic*, a daily newspaper of general circulation in the Phoenix metropolitan area, an advertisement stating the availability of their services and setting forth fees for certain of their services. (App. p. 18a, *infra*). For example, the fee for an uncontested divorce was stated to be \$175.00 plus \$20.00 filing fee. The advertisement combined with its attendant publicity did lead to an increase in the number of appellants' clients during the six week period following the advertisement.

On March 2, 1976 appellants were charged by the appellee State Bar of Arizona with violation of Disciplinary Rule 2-101

(B), Ariz. Supreme Ct. Rule 29(a).<sup>1</sup> That Rule totally forbids advertising by attorneys in media of general public circulation. A hearing was held before a three-man administrative committee of the State Bar on April 8, 1976. That committee took the position that it could not entertain attacks on the validity of DR 2-101(B), but it permitted a full record to be made to serve as the foundation for such an attack before the Arizona Supreme Court. For example, expert testimony was adduced that prohibitions of price advertising by pharmacists and optometrists had been proven to raise prices artificially, and that there was good reason to conclude that DR 2-101(B) had the same effect upon legal services; relaxation of the ban would result in services becoming available at lower fees without a decrease in quality. The administrative committee then found appellants to have violated DR 2-101(B) and recommended that each be suspended from the practice of law for not less than six months.

The matter was reviewed on April 28, 1976 by the Board of Governors of the State Bar, which similarly found appellants to have violated DR 2-101(B) but which recommended that appellants be suspended for one week each, consecutively.

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1. On February 27, 1976 appellants sued appellee and others in U.S. District Court for the District of Arizona, seeking to enjoin the disciplinary proceedings which are the subject of this appeal. *John R. Bates and Van O'Steen v. State Bar of Arizona, Board of Governors of the State Bar of Arizona, and Mark I. Harrison, President of the State Bar of Arizona*, CIV. No. 76-155 PHX (D.Ariz., filed Feb 27, 1976). On March 26, 1976 the federal court denied appellants' motion for temporary restraining order, permitting the state proceeding to go forward. Appellants' request for the convening of a three-judge court and motion for preliminary injunction are still under advisement in federal court. The federal action has consequently been in effective abeyance while both parties pursued the matter through the state system. The state proceeding below was wholly independent of the federal action and the questions presented by this appeal were fully litigated in the Arizona Supreme Court. The finality of the decision below for purposes of this appeal is therefore unaffected by the federal action. *Cf. NAACP v. Button*, 371 U.S. 415, 427-428 (1963).

The matter was next reviewed by the Supreme Court of Arizona. On July 26, 1976, that Court ruled that appellants had violated DR 2-101(B). It further ruled, one Justice dissenting, that DR 2-101(B) did not violate the First Amendment (applied through the Fourteenth) or the Sherman Act. The Sherman Act was held not to extend to lawyers' advertising, and to be inapplicable to the Court's regulation of attorneys by reason of the "state action" exemption delineated in *Parker v. Brown*, 317 U.S. 341 (1943). The sanction imposed against appellants by the Court was formal censure, ordered in the Court's opinion and effective 15 days after filing of the opinion without further action or order of the Court. Formal censure is a matter of public record and it is the policy of the State Bar of Arizona to publicize actions of censure to the Bar and the public generally. A prior censure may also be taken into account in recommending or imposing discipline in future disciplinary proceedings. Arizona Supreme Court Rule 38(a) (4).

On August 5, 1976, Mr. Justice Rehnquist granted appellants' application for a stay of the censure pending final determination of the matter by this Court.

The federal questions of invalidity of DR 2-101(B) by reason of conflict with the First and Fourteenth Amendments and with Sections 1 and 2 of the Sherman Act were raised by appellants in their answer to the charge before the administrative committee, in their objections to the Board of Governors, and in their objections to the Arizona Supreme Court. Both questions were discussed and decided by the Arizona Supreme Court in its opinion below.

Appellants' practice involves numerous transactions affecting interstate commerce, as does that of members of the State Bar generally. Over 2000 copies of the advertisement which is the subject of this proceeding were distributed in interstate commerce.

### THE QUESTIONS ARE SUBSTANTIAL

This appeal raises questions of obvious national importance. Virtually every State imposes severe restrictions or prohibitions



upon public advertising by attorneys,<sup>2</sup> and these prohibitions are under attack in federal courts in California, Colorado, Hawaii, Michigan, New York, North Carolina, Pennsylvania, Wisconsin and Virginia.<sup>3</sup> The continuing inability to advertise renders it difficult or impossible for attorneys such as appellants successfully to operate legal clinics offering inexpensive services to persons of low or moderate income, and inhibits other exper-

2. The recent amendments to the Code of Professional Responsibility by the American Bar Association relaxed the rules against advertising by individual attorneys only to the extent of permitting limited advertising in classified sections of telephone directories or directories published by bar associations. 62 A.B.A.J. 309 (1975). The amendment is not in effect in Arizona or most other States, and would not in any event permit advertisement of fees for specific services or advertisement in mass media such as that engaged in by appellants.

3. *Consumers Union of United States, Inc. et al. v. Board of Governors, State Bar of California, et al.* Civil No. C 75 2385 SC (N.D. Cal. 1975); *Maurice R. Franks v. Grievance Committee of the Supreme Court of Colorado, et al.* Civil No. 75-1358 (D. Colo. 1975); *Niles v. Lowe* Civil No. CV 75-0322 (D. Haw. 1975); *Michael G. Slaughter v. Michigan State Bar Grievance Board* Civil No. 571211 (E.D. Mich.); *Person v. Association of Bar of New York*, Civil No. 75C 987 (E.D.N.Y. filed June 23, 1975); *Ronald Williams v. The North Carolina State Bar, et al.*, Civil No. 75 40 (W.D.N.C. 1976); *Michael S. Bomstein v. The Disciplinary Board of the Supreme Court of Pennsylvania*, Civil No. 76-464 (E.D. Pa. 1976). *Marine v. State Bar of Wisconsin, et al.* Civil No. 76 C 373 (E.D. Wis. 1976); *Hirschkop v. Virginia State Bar*, Civil No. 76-692-A (E.D. Va. 1975); *Consumers Union of United States v. American Bar Ass'n*, Civil No. 75-0105-R (E.D. Va. 1975); *In re Jacoby & Meyers*, L.A. No. 2280 (Cal. State Bar, L.A. 1975). The Justice Department has also recently brought suit against the American Bar Association attacking the advertising restrictions of the Code of Professional Responsibility on antitrust grounds. *United States of America v. American Bar Association* Civil No. 76-1182 (D. Columbia 1976).

iments and innovations in the delivery of legal services. The suppression of information regarding the cost and availability of legal services has a markedly adverse effect upon a public one third of which has never consulted a lawyer and another third of which has done so only once, despite the widespread existence of problems calling for legal assistance. B. Curran & F. Spalding, *The Legal Needs of the Public* 63, 79-81 (Prelim. Rep., Am. B. Found., 1974).

The decision below upholding the prohibition against advertising is erroneous on both federal grounds asserted here, and the issues are so substantial as to merit plenary review by this Court.

# I.

## *The First Amendment.*

The First Amendment question in this case is the one clearly foreshadowed but left open in *Bigelow v. Virginia*, 421 U.S. 809 (1975) and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 44 U.S.L.W. 4686 (May 24, 1976.) The rationale of those decisions protecting commercial speech extends to the present case and invalidates Disciplinary Rule DR 2-101(B) on its face and as applied to appellants.

### (a.) *Appellants' advertising is protected expression.*

In *Virginia State Board of Pharmacy, supra*, this Court made it abundantly clear that First Amendment protection extended to the advertisement of purely economic information — an offer to sell "the X prescription drug at the Y price." 44 U.S.L.W. at 4689.

The protection was justified by the great importance of commercial information to the consumer and to the overall allocation of resources in a free enterprise society. *Id.* at 4690-92. Appellants' advertisement in the present case contained exactly the same kind of hard economic information, offering specified services at specified fees. The importance of the information to the consumers is all the greater in this instance because it aids them in obtaining legal services to which they have independent rights under the First and other Amendments. *NAACP v. Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964). The Court below accordingly erred in failing to hold appellants' advertisement protected by the First Amendment.



(b). *Disciplinary Rule 2-101(B)* is fatally overbroad.

This Court has indicated that there may be special considerations attached to the subject of advertising by attorneys. *Virginia State Board of Pharmacy*, *supra*, 44 U.S.L.W. at p. 4693, n. 25. But none of those considerations justify the action of the Court below in upholding a total ban on direct public advertising by private attorneys. A state regulation which impinges upon First Amendment expression must be drawn as narrowly as possible, and the state must show that no less restrictive means of regulation will suffice. *Shelton v. Tucker*, 364 U.S. 479, 488-90 (1960); *Talley v. California*, 363 U.S. 60, 62-64 (1960). Recognition that lawyers' services may vary does not justify a total ban on advertising even of the most standardized services. A state interest in avoiding misrepresentation can be met by prohibiting deceptive or misleading advertising. To suppress all public advertising because some of it might be misleading is not the way of the First Amendment. *Virginia State Board of Pharmacy*, *supra*.

## II.

### *The Sherman Act.*

The Court below erred in holding that the prohibition of advertising by attorneys did not fall within the reach of the Sherman Act as it was applied to the professions in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). An agreement to suppress the advertising of prices is *per se* violative of the Sherman Act. *United States v. Gasoline Retailers Ass'n, Inc.*, 285 F. 2d 688 (7th Cir. 1961); *cf. Louisiana Petroleum Retail Dealers v. Texas Co.*, 148 F. Supp. 334 (W.D. La. 1956). In holding that the Sherman Act did not render illegal the suppression of price advertising by attorneys, the Court below relied primarily upon the so-called "state action exemption" as set forth in *Parker v. Brown*, 317 U.S. 341 (1943). That reliance is misplaced.

(a.) *The prohibition of price advertising is not shielded from the Sherman Act under the doctrine of Parker v. Brown.*

*Parker v. Brown*, *supra*, held that California's anticompetitive marketing program operated (consistently with a related federal program) by the "legislative command of the state", 317 U.S. at 350, was not within the intended scope of the Sherman Act. In

the present case there is no unequivocal anticompetitive legislative mandate, and for that reason alone the exemption may fail. But even more important, a state action exemption in the present case runs counter to this Court's decision in *Cantor v. Detroit Edison Co.*, 44 U.S.L.W. 5357 (July 6, 1976).<sup>4</sup>

In *Cantor*, it was emphasized that "state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." 44 U.S.L.W. at 5361 (footnotes omitted). Consequently, an anticompetitive policy of a regulated power company was held to create Sherman Act liability even though the policy had been embodied in a rule of the state utility commission that the company was not free to violate. The present case involves a parallel situation. The prohibition of price advertising of DR 2-101(B), like that of the Canons of Ethics before it, originated with the American Bar Association, a private organization. Its initial enforcement is in the hands of appellee State Bar of Arizona, an autonomous and self-regulating body which elects its own leadership. As such it is not automatically exempt from the Sherman Act. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975). The participation of the Supreme Court of Arizona in the privately originated suppression of advertising ought not to immunize that suppression from the reach of the antitrust laws. And, as the Court below recognized, the federal antitrust laws are a defense to the enforcement by a state court of a practice which would amount to a violation of those laws. *Cf. Continental Wallpaper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 (1909); *General Aniline & Film Corp. v. Bayer*, 305 N.Y. 479, 113 N.E. 2d 844 (1953).

Finally, the Court below erred in automatically exempting its Rule against advertising without determining whether the Rule was so essential to its scheme of regulation that it justified the frustration of the federal antitrust laws. *Cantor* requires such weighing, so that the state laws may be accommodated to the

4. Although not cited by the Court below, the *Cantor* decision was furnished to that Court as soon as it became available two weeks before rendition of the decision below. The arguments made above which are now supported by *Cantor* were briefed and submitted to the Court below prior to the decision in *Cantor*, and the pendency of the *Cantor* case was noted in appellants' brief.

requirements of the federal antitrust laws just as federal non-antitrust statutes are. *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). No such weighing took place below, and it seems clear that a prohibition against advertising is in no way essential to the general scheme of regulation of the practice of law. The prohibitions against advertising should accordingly be struck down as conflicting with the Sherman Act.

### III.

#### *Jurisdiction of this Court.*

Disciplinary Rule 2-101(B), embodied in Rule 29(a) of the Supreme Court of Arizona, is a statute of a state within the meaning of 28 U.S.C. § 1257(2). *Lathrop v. Donohue*, 367 U.S. 820 (1961). Jurisdiction accordingly lies under that statute for an appeal upholding the validity of the Rule against attacks based on its repugnancy to the First and Fourteenth Amendments and to the Sherman Act.

### CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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# APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE  
STATE OF ARIZONA

In Banc

In the Matter of Members of The State Bar of Arizona  
JOHN R. BATES and VAN O'STEEN, *Respondents*

ORIGINAL PROCEEDING FOR DISCIPLINARY ACTION  
CERTIFIED TO THE SUPREME COURT BY THE BOARD  
OF GOVERNORS OF THE STATE BAR OF ARIZONA

Respondents Censured  
(Filed July 26, 1976)

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William C. Canby, Jr.  
*Attorney for Respondents*

Phoenix

CAMERON, Chief Justice

This matter is before the court on objections to the conclusions of the law and recommendations of the Board of Governors of the State Bar of Arizona which held that the respondents John R. Bates and Van O'Steen, attorneys at law, were guilty of violating the disciplinary rules for attorneys as provided in Rule 29(a) of the Rules of the Supreme Court, 17 A.R.S.

We must answer the following questions on review:

1. Does DR 2-101(B) violate either the federal or state anti-trust laws?
2. Does DR 2-101(B) violate the First and Fourteenth Amendments of the United States Constitution?
3. Does DR 2-101(B) violate the Fourteenth Amendment right of equal protection of the law?



4. Is DR 2-101(B) void for vagueness?
5. Does the State Bar Disciplinary procedure violate due process?

The facts of this case are not in dispute. John R. Bates and Van O'Steen are law partners engaged in the practice of law under the name of the "Legal Clinic of Bates and O'Steen." On 22 February 1976, respondents published an advertisement in the *Arizona Republic*, a newspaper of state-wide and substantial out-of-state circulation, publicizing the availability of their legal services and stating fees for certain services. See Exhibit A.

Disciplinary Rule 2-101(B) of Rule 29(a) of the Rule of the Supreme Court reads:

"A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.\*\*\*"

Respondents admit they knowingly violated DR 2-101(B).

After complaint, hearing, and findings by a Special Administrative Committee, the Board of Governors made the following findings of fact, conclusions of law, and recommendations:

"This matter having come on for full and final hearing on April 7, 1976, before the Special Administrative Committee of Ivan Robinette, Carl W. Divelbiss, and Phillip E. vonAmmon, Chairman, and the matter having been heard, evidence having been taken, and briefs having been submitted, and the Board of Governors having reviewed the above matter on April 28, 1976, it is now determined and recommended by the Board as follows:

#### FINDINGS OF FACT

"The Respondents, John R. Bates and Van O'Steen, did, in fact cause an advertisement for their law office to be published in a Phoenix newspaper, as charged in the Formal Complaint and as admitted in the Answer.

#### CONCLUSIONS OF LAW

"The act of the Respondents violates Disciplinary Rule 2-101(B).

#### RECOMMENDATIONS

"The act of the Respondents was on one hand a deliberate and knowing violation of the Rule, but on the other hand was undertaken as an earnest challenge to the validity of a rule they conscientiously believed to be invalid. We therefore recommend a penalty of one-week suspension from the practice of law for each of them, the weeks to run consecutively and not simultaneously, so as to avoid the closing down of their practice.

"We further recommend that the enforcement of this discipline be suspended until 30 days after a final decision has been made concerning the validity of the rule in the highest court to which it is presented.

"The foregoing Findings of Fact, Conclusions of Law and Recommendations are issued by the Board of Governors this 30th day of April, 1976, pursuant to Rule 36(d) of the Rules of the Supreme Court of the State of Arizona.

Mark I. Harrison, President  
State Bar of Arizona

Respondents timely objected to the recommendations of the Board of Governors and the matter was transferred to this Court pursuant to Rule 36(d) of the Rules of The Supreme Court.

#### ANTITRUST LAWS

Respondents contend that DR 2-101 violates Sections 1 and 2 of the Sherman Act. 15 U.S.C. § 1, 2 and Arizona antitrust statutes A.R.S. § § 44-1401 through 44-1413. That a rule is a violation of the federal or state antitrust laws is a defense when the court is being asked to enforce a violation of these rules, *Continental Wallpaper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 29 S. Ct. 280, 53 L.Ed. 486 (1909); *Sola Electric Co. v.*

*Jefferson Electric Co.*, 317 U.S. 173, 63 S. Ct. 172, 87 L.Ed.2d 165 (1942), and this defense is available in the state court. *General Aniline & Film Corp. v. Bayer*, 301 N.Y. 479, 113 N.E. 2d 844 (1953).

In support of their position, respondents rely heavily on *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L.Ed.2d 572 (1975). In *Goldfarb, supra*, the Supreme Court held that a county bar's publication of a minimum fee schedule, and enforcement of this schedule through professional discipline by the state bar, was anticompetitive activity which the Sherman Act was clearly meant to proscribe.

We do not believe that the holding of *Goldfarb, supra*, applies to the facts of this case. *Goldfarb, supra*, was concerned with a minimum fee schedule. Attempts at minimum fees or price floors are traditionally the target of antitrust laws, state and federal, as they tend to artificially raise the prices of goods and services without a corresponding increase in the value of those services. The control of advertising by the Supreme Court of members of the Bar is far different than price fixing by a local bar association. We do not believe that Disciplinary Rule 2-101 (B) conflicts with *Goldfarb, supra*.

However, even if we were to find that DR 2-101(B) violated the provisions of the Sherman Act, we believe this would be state action which is exempt by the Sherman Act. The Sherman Act was not meant to restrain activities required by the state acting as a sovereign. The Supreme Court stated:

\*\*\*\*[I]n view of the [Act's] words and history, it must be taken to be a prohibition of individual and not state action.

\*\*\* The state \*\*\* imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.

\*\*\*\* *Parker v. Brown*, 317 U.S. 341, 352, 63 S. Ct. 307, 341, 87 L.Ed. 315, 326 (1943).

This position was reinforced by the United States Supreme Court in *Goldfarb, supra*, as follows:

"The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as a sovereign. (citations omitted) Here we need not inquire further into the state action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities

of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floors which arise from respondents' activities. \*\*\*\* 95 S. Ct. at 2015.

The regulation of the State Bar by the Supreme Court is an activity of the State of Arizona acting as sovereign and exempt by the very provisions of the Sherman Act. *Parker v. Brown, supra*; *State of New Mexico v. American Petrofina, Inc.*, 501 F. 2d 363 (9th Cir. 1974).

There is, however, another reason why the respondents reliance upon the antitrust provision of the state and federal acts is misplaced, over and above the exemption contained in the Sherman Act. The State Bar of Arizona is an integrated bar, integrated by court rule, Rule 27, Rules of the Supreme Court and subject to the regulation of that court, and the legislative branch of government, state or federal, may not interfere with the court in the reasonable and constitutional regulation of the practice of the law. This seems to have been recognized by the Supreme Court in *Goldfarb, supra*, when it stated:

\*\*\*\* The interest of the States in regulating lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' (citations omitted) In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions." *Goldfarb v. Virginia State Bar, supra*, 421 U.S. at , 95 S. Ct. at 2016, 44 L.Ed.2d at 588.

#### FIRST AMENDMENT

Respondents urge that DR 2-101(B) should be declared null and void as a violation of the First Amendment. *Bigelow v. Virginia*, 421 U.S. 809, 95 S. Ct. 2222, 44 L.Ed.2d 600 (1975) and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, U.S. , S.Ct. , L.Ed. 2d (1976). We disagree. Restrictions on professional activity, and in particular advertising, have repeatedly survived constitutional



challenge. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S. Ct. 461, 99 L.Ed. 563 (1955); *Barsky v. Board of Regents*, 347 U.S. 442, 74 S. Ct. 650, 98 L.Ed. 829 (1954); *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 55 S. Ct. 570, 79 L.Ed. 1086 (1935). The legal profession, like the medical profession, has always prohibited advertising since it is a form of solicitation deemed contrary to the best interests of society. In *re Cohen*, 261 Mass. 484, 159 N.E. 495 (1928); *State v. Crocker*, 132 Neb. 214, 271 N.W. 444 (1937); *Mayer v. State Bar of California*, 2 Cal.2d 71, 39 P. 2d 206 (1934).

In the case of *Bigelow v. Virginia*, *supra*, a newspaper editor was convicted of running an ad offensive to a Virginia statute concerning abortions. In the instant case, we are not concerned with the prosecution of the newspaper for running the ad in question. Were this the case, we would have no hesitancy in invoking the First Amendment in the newspaper's favor. In the instant case we are concerned with the regulation of the attorneys for violating the rule against advertising by an attorney. That *Bigelow*, *supra* does not apply is indicated in the footnote which states:

"Our decision also is in no way inconsistent with our holdings in the Fourteenth Amendment cases that concern the regulation of professional activity." *Bigelow v. Virginia*, 421 U.S. at , 95 S. Ct. at 2234, 44 L.Ed.2d at 614.

The recent case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, *supra*, relied upon by the respondents can also be distinguished. *Virginia Board of Pharmacy*, *supra*, concerned the power of the state to prohibit the advertising of prepackaged prescription drugs. Mr. Chief Justice Burger in his concurring opinion stated:

"Our decision today, therefore, deals largely with the State's power to prohibit pharmacists from advertising the retail price of prepackaged drugs. As the Court notes, *ante*, at 25 n. 25, quite different factors would govern were we faced with a law regulating or even prohibiting advertising by the traditional learned professions of medicine or law.

"The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb v. Virginia State Bar*, 421

U.S. 733, 792 (1975). See also *Cohen v. Hurley*, 366 U.S. 117, 123-124 (1961).\*\*\*

\*\*\*\*I think it important to note also that the advertisement of professional services carries with it quite different risks than the advertisement of standard products. The Court took note of this in *Semler*, 294 U.S. at 612, in upholding a state statute prohibiting entirely certain types of advertisement by dentists:

'The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous.'

"I doubt that we know enough about evaluating the quality of medical and legal services to know which claims of superiority are 'misleading' and which are justifiable. Nor am I sure that even advertising the price of certain professional services is not inherently misleading since what the professional must do will vary greatly in individual cases. It is important to note that the Court wisely leaves these issues to another day." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, *supra*, U.S. at , S.Ct. at , L. Ed.2d at .

And footnote 25 in the major opinion stated:

"We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions,



historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra*, U.S. at , S. Ct. at , L.Ed2d at . We find no First Amendment violation.

### EQUAL PROTECTION

Respondents contend that since advertising is permitted by qualified legal assistance organizations, they are being denied equal protection of the law by not being allowed to advertise. Respondents, in their brief, state:

"\*\*\*No such compelling state interest has been shown why advertising by private attorneys must be totally banned while some advertising of qualified groups is permitted, and while attorneys engaged in political or organizational activities may publicize themselves as attorneys. The total ban of advertising by attorneys in relation to their private practice therefore violates the equal protection clause of the Fourteenth Amendment."

We disagree. DR 2-101(B) further reads as follows:

"\*\*\*However, a lawyer recommended by, paid by, or whose legal services are furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits. This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

- "(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.
- "(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reason-

ably pertinent for a purpose other than the attraction of potential clients.

- "(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.
- "(4) In and on legal documents prepared by him.
- "(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.
- "(6) In communications by a qualified legal assistance organization, along with the biographical information permitted under DR 2-101(A)(6), directed to a member or beneficiary or such organization."

We believe that these classifications are reasonable. For example, the purpose of allowing legal assistance organizations a limited amount of advertising is to bring to the attention of those of limited finances who are in need of legal assistance but who are frequently unaware of the fact that such services are available. The attorney himself may not advertise but only the legal assistance organization.

We do not believe that DR 2-101(B) violates the equal protection provisions of the United States Constitution or the Arizona Constitution.

### VAGUENESS

Respondents further contend that they are being denied due process because Rule DR 2-101(B) is void for vagueness. Respondents contend that a rule must be sufficiently definite that a person of ordinary intelligence may understand whether his contemplated conduct is prohibited. Of course, in the instant case, there is no indication that the respondents did not know the advertisement violated DR 2-101(B).

We do not find the rule vague or overbroad and persons of ordinary intelligence, be they attorney or non-attorney, should have no difficulty in reading this rule as prohibiting a lawyer from publicizing himself "through newspaper or magazine advertisements." DR 2-101(B).

## DUE PROCESS

Respondents contend that Rules 26 through 33 of this court violate due process because the members of the Special Administrative Committee and the Board of Governors were in competition with the respondents. Respondents cite the United States Supreme Court:

"It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L.Ed. 749 (1927). And *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed. 2d 267 (1972), indicates that the financial stake need not be as direct or positive as it appeared to be in *Tumey*. It has also come to be the prevailing view that '[m]ost of the law concerning disqualification because of interest applies with equal force to\*\*\* administrative adjudicators.'\*\*\*" *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S. Ct. 1689, 1698, 36 L.Ed. 2d 488, 500 (1973).

Admittedly, there is a question when members of a profession attempt to self-regulate their profession and impose discipline for violations of what may be at times technical and complex standards. While there is a necessity for fair and impartial hearings, there is also the necessity that the persons who must hear the allegations of professional misconduct have the required knowledge of the standards and needs of the profession. Non-professionals alone could not bring to the hearings a sufficient knowledge and understanding of professional standards or a compulsion to enforce them. The most the non-professional would bring to such a hearing is business ethics and business ethics, while adequate for the commercial world, are not sufficient as a standard for professional conduct. We must then balance the need for an informed and concerned Board with the degree of pecuniary interest, however slight or minimal, which may exist when attorneys sit in judgment of other attorneys. In the instant case, we do not find a sufficient pecuniary interest by the Committee or the Board to require that they be disqualified because of interest.

Even if we were to find that the Board and Committee had a sufficient pecuniary interest to make them suspect, there is a safeguard in that the final arbiter in disciplinary matters is the

Supreme Court which has the obligation to make an independent determination of the facts from the record. In *re Johnson*, 106 Arizona. 73, 471 P. 2d 269 (1970); In *re Lurie*, Ariz. , 546 P. 2d 1126 (1976). There is no pecuniary conflict between the members of this court and the respondents and we find no lack of due process.

## DISPOSITION

The Board of Governors recommended that since the act of placing the advertisement in the *Arizona Republic* was done in good faith as an earnest challenge to the validity of DR 2-101(B), respondents should only be suspended from the practice of the law for one week each, the weeks to run consecutively. We agree with the Board of Governors that the act was done in good faith to test the constitutionality of DR 2-101(B). We believe that the respondents should be censured only.

It is ordered that upon issuance of the mandate herein, the respondents John R. Bates and Van O'Steen are guilty of the violation of DR 2-101(B), Rule 29(a), 17 A.R.S., and that they and each of them are censured.

JAMES DUKE CAMERON,  
Chief Justice

## CONCURRING:

FRED C. STRUCKMEYER, JR.,  
Vice Chief Justice

## GORDON, Justice (Specially Concurring):

I concur in the result. While I agree with much of the law and many of the comments expressed by the majority, I feel compelled to add a few comments of my own.

The content of the advertisement in this case highlights the concern expressed by the Chief Justice Burger in his concurring opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 44 U.S.L.W. 4686 (5/24/76):

“\*\*\*[T]he advertisement of professional services carries with it quite different risks than the advertisement of standard products.

\* \* \*

“I doubt that we know enough about evaluating the quality of medical and legal services to know which claims of superiority are ‘misleading’ and which are justifiable. Nor am I sure that even advertising the price of certain professional services is not inherently misleading, since what the profession must do will vary greatly in individual cases. It is important to note that the Court wisely leaves these issues to another day.” *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 44 U.S.L.W. at 4692.

Few members of the Bar, much less the public at large, would similarly define or explain what services were included in handling a “simple” or “uncontested” divorce. Moreover, I am able to foresee instances in which the \$175.00 fee quoted for this service would be unreasonably high. Is it deceptive to advertise legal services in connection with an uncontested adoption proceeding when by statute the county attorney, upon application, is required to perform similar services without expense to the petitioner? A.R.S. § 8-127.

These and other difficulties demonstrate some of the substantial policy considerations which justify restrictions on advertising by attorneys. Whether a blanket ban on certain forms of advertising is unconstitutional as violative of the First Amendment is a far weightier question which I am not yet prepared to resolve in the negative. I am concerned, however, that to impulsively discard the regulations leaving few if any guidelines in their wake, might well initiate a flood of media combat for legal business which would serve neither the best interest of the public nor the bar.

FRANK X. GORDON, JR., Justice

HAYS, Justice (Dissenting)

I dissent. I agree with the opinion of the majority in all respects except that I cannot go along with the punishment imposed. It appears to me that the “watered down” version of punishment adopted by the majority invites more and better testing of all the provisions of the Code of Professional Ethics. Admittedly, the Respondents violated the Code in order to secure more clients for their legal clinic. The testing of an allegedly questionable provision was incidental and the method of testing was the one calculated to attain the monetary advantage sought.

I would adopt the penalty recommended by the Special Administrative Committee, suspension for not less than six (6) months.

JACK D. H. HAYS, Justice

HOLAHAN, Justice (Dissenting)

The matters presented by this case involve important issues of constitutional law and public policy. Recent decisions of the Federal Supreme Court have brought into question activities which were once assumed lawful in the regulation of professional conduct of attorneys. Assumptions of the past must be reexamined in light of the continual development of First Amendment rights. Despite my own personal dislike of the concept of advertising by attorneys, I have concluded that the advertising ban contained in DR 2-101(B) of the Disciplinary Rules is unconstitutional.

There is an additional consideration present in this case, which, aside from the constitutional issues, suggests that we should not enforce the ban on advertising when it deals with the fees to be charged for services. In *Goldfarb v. Virginia State Bar*,



the United States Supreme Court held that minimum fee schedules for attorneys is price fixing forbidden by the Sherman Act. The ban on advertising by attorneys is also under attack as a method of price fixing which is equally unlawful under the Sherman Act. The majority opinion does not contend that the absolute ban on advertising by attorneys is not a violation of the Sherman Act. This Court is content to rely on the position that the ban is exempt from the Sherman Act as state action, citing *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

Since the ban on advertising by attorneys was enacted by this Court under the authority of the State Constitution, the time has arrived for us to review that ban in light of the fact that such action is in fact contrary to the national public policy. It may be that we have the power to exempt attorneys from the Sherman Act, but should we continue such a position in the face of a national public policy to the contrary?

While this Court may enact an exemption from the Sherman Act, it may not limit the rights of persons under the First Amendment. What is at stake in this case is more than regulation of a profession or the discipline of two lawyers. More fundamentally there is involved the right of the public as consumers and citizens to know about the activities of the legal profession. Obviously the information of what lawyers charge is important for private economic decisions by those in need of legal services. Such information is also helpful, perhaps indispensable, to the formation of an intelligent opinion by the public on how well the legal system is working and whether it should be regulated or even altered. This Court's power to regulate the profession of law comes from the people, and what the people give they can also take away. The rule at issue prevents access to such information by the public.

In May of this year, the United States Supreme Court struck down a ban on advertising of prices by pharmacies in the State of Virginia. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, U.S. , S.Ct. , L.Ed. 2d (No. 74-895 decided May 24, 1976). The case held that "commercial speech" (advertising) is entitled to First Amendment protection. Society and consumers were held to have strong interest in the free flow of commercial information.

The majority opinion correctly points out that the U.S. Supreme Court reserved judgment on whether a ban on commercial advertising might be constitutional, stating:

"We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." U.S. , S.Ct. , L.Ed. 2d

While the majority concludes that this statement supports a complete ban of advertising by attorneys, I am not inclined to such a conclusion. Certain kinds of advertising by lawyers may cause confusion and deception, but the remedy is to ban such kinds of advertising rather than any form of advertising. This appears to me to be what the Court meant in *Va. Pharmacy Bd.* when it stated: "In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way." Slip Op. P. 22. Similarly, the Court noted: "Untruthful speech, commercial or otherwise, has never been protected for its own sake." Slip Op. p. 23.

Disciplinary Rule 2-101(B) purports to ban advertising by attorneys, but in reality the rule discriminates between one type of commercial advertising and another type which is permitted by Disciplinary Rule 2-102(A)(6).

.....

"(A) A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:

"(6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list is conclusively established

to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or law firm specializes in a particular field of law or law practice but only if authorized under DR 2-1-5(A)(4); date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships in bar associations; memberships and offices in legal fraternities and legal societies, technical and professional associations and societies, foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented."

By whatever name described the "reputable law list" is advertising. It strains reason to contend that listing a law firm's clients is not a method of publicizing the success and expertise of the members of the firm in servicing clients, especially well-known corporate enterprises. The discrimination between other commercial media and reputable law lists has no rational basis. It is true that law lists are generally directories furnished to subscribers who are lawyers and other special groups. The record in this case notes that some law lists appear in public libraries. If the information in such directories is not misleading or injurious to the public or to the profession, there appears to be no justifiable reason why such material cannot also be used in the commercial media generally.

In summary, the ban on advertising by attorneys contained in DR 2-101(B) is contrary to national policy, is a denial of First Amendment rights, and violates the equal protection provision of the Fourteenth Amendment. This Court should forthrightly declare the rule unconstitutional. We can then attempt to write rules which provide for public access to information about attorneys. It may be that the information currently permitted to be published in "reputable law lists" is also suitable for the members of the public. In any event what we have now is defec-

tive. We need to create new guidelines which allow for broader dissemination of information to the public but at the same time protect them from misleading or deceptive statements.

WILLIAM A. HOLOHAN, Justice

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19a

## **APPENDIX B**

### **IN THE SUPREME COURT OF ARIZONA**

In the Matter of Members of  
The State Bar of Arizona  
JOHN R. BATES and VAN O'STEEN, *respondents*.

NO. SB 96  
Notice of Appeal

Notice is hereby given that Respondents JOHN R. BATES and VAN O'STEEN appeal to the Supreme Court of the United States from the final order entered in this proceeding by the Supreme Court of Arizona on July 26, 1976. This appeal is taken pursuant to the provisions of 28 U.S.C. §1257 (2).  
Dated this 28th day of July, 1976.

William C. Canby, Jr.  
*Attorney for Respondents*



## APPENDIX C

Sherman Act, 15 U.S.C. §§ 1 and 2

§ 1. Trusts, etc. in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Supreme Court, U. S.

FILED

NOV 17 1976

MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

No. 76-316

JOHN R. BATES and VAN O'STEEN

*Appellants,*

—V.—

STATE BAR OF ARIZONA,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

JURISDICTIONAL STATEMENT FILED SEPTEMBER 1, 1976  
PROBABLE JURISDICTION NOTED OCTOBER 4, 1976

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## RELEVANT DOCKET ENTRIES

Note: The proceeding below was technically original with the Arizona Supreme Court. There is no formal docket entry list. The following constitutes a list of relevant entries to the official file and the dates thereof.

<u>DATE</u>	<u>PROCEEDING</u>
1976	
March 2,	FORMAL COMPLAINT with exhibit and Notice filed.
March 23,	RESPONDENTS' Memorandum of Law filed.
March 23,	RESPONDENTS' Notice of Factual Issues filed.
March 23,	SYNOPTICAL STATEMENT of Position of Complainant filed.
March 23,	RESPONDENTS' ANSWER filed.
April 8,	STIPULATION for Addition to Record filed.
April 8,	FINDINGS of Fact, Conclusions of Law, and Recommendations



DATEPROCEEDINGS

of Special Local Administrative Committee of the State Bar of Arizona for District No. 5, signed.

April 27, RESPONDENTS' Objection to Recommendation of the Administrative Committee and Request for Oral Argument before the Board of Governors, filed.

April 30, FINDINGS of Fact, Conclusions of Law and Recommendations of the Board of Governors of the State Bar of Arizona, signed.

May 4, RESPONDENTS' Objection to Recommendations of Board of Governors, filed.

May 7, STIPULATION and Order regarding timing for filing of briefs and waiver of

DATEPROCEEDINGS

oral argument filed.

May 7, TRANSCRIPT of proceedings before the Special Local Administrative Committee of the State Bar of Arizona for District No. 5, with Exhibits, filed.

May 7, BRIEF of the State Bar of Arizona to the Supreme Court of Arizona, filed.

May 7, BRIEF of Respondents to the Supreme Court of Arizona, filed.

May 17, Board of Governors of the State Bar of Arizona hearing transcript, filed.

June 1, MEMORANDUM re: Supplemental Citation with Exhibit and Affidavit of Service, filed.

June 1, SUPPLEMENTAL memorandum of Respondent and Affidavit



DATEPROCEEDINGS

of Service, filed.

July 12, LETTER from William C. Canby, Jr. to The Honorable James Duke Cameron dated July 9, 1976 transmitting a copy of the U.S. Supreme Court decision in Cantor v. Detroit Edison, Co. (No. 75-122 decided July 6, 1976), filed.

July 26, OPINION and ORDER of the Arizona Supreme Court entered.

July 26, NOTICE of Decision by Clifford H. Ward, Clerk of the Arizona Supreme Court, filed.

July 28, NOTICE of Appeal to the United States Supreme Court and Proof of Service filed.

DATEPROCEEDINGS

August 9, ORDER of Mr. Justice Rehnquist staying order of censure, filed.

SPECIAL LOCAL ADMINISTRATIVE COMMITTEE  
OF THE  
STATE BAR OF ARIZONA  
FOR  
DISTRICT NO. 5

In the Matter of a Member of )  
The State Bar of Arizona )  
JOHN R. BATES and VAN ) No. 76-1-S16  
O'STEEN, )  
Respondents. )

---

FORMAL COMPLAINT  
(Dated March 2, 1976)

TO: JOHN R. BATES and VAN O'STEEN, Respondents;

Complaint is made against you as follows:

1. Respondents are members of the State Bar of Arizona.
2. On February 22, 1976 Respondents caused to be published in a newspaper, The Arizona Republic, an advertisement offering Respondents' legal services and publicizing fees. A copy of this advertisement is attached as Exhibit A to this complaint.
3. Publication of this advertisement is

in violation of the Code of Professional Responsibility of the State Bar of Arizona, specifically Disciplinary Rule 2-101 (B).

4. This formal complaint is issued and served by order of Special Local Administrative Committee S16 of the State Bar of Arizona pursuant to and in accordance with the rules of the Supreme Court of Arizona pertaining to discipline of attorneys.

Dated: March 2, 1976

By: Philip E. von Ammon  
Chairman - Special  
Local Administrative  
Committee

Exhibit A, copy of advertisement which appeared in the Arizona Republic on February 22, 1976, appears on page 409, infra.

SPECIAL LOCAL ADMINISTRATIVE COMMITTEE  
OF THE  
STATE BAR OF ARIZONA  
FOR  
DISTRICT NO. 4A

In the Matter of a Member     )  
  )  
Of the State Bar of Arizona    ) No. 76-1-616  
  )  
  )

---

ANSWER  
(Dated March 23, 1976)

For their answer to the Formal Complaint in the proceedings herein, Respondents John R. Bates and Van O'Steen allege as follows:

1. Allegations of paragraph 1 are admitted.
2. Allegations of paragraph 2 are admitted.
3. Allegations of paragraph 3 are admitted, but Respondents allege the invalidity of Disciplinary Rule 2-101(B) for the reasons stated in paragraphs 5 through

12 of this Answer.

4. Not having sufficient information to form a belief, Respondents deny the allegations of paragraph 4.

5. Respondents allege that Disciplinary Rule 2-101(B) on its face and as enforced violates the rights of Respondents to freedom of speech and press under the First and Fourteenth Amendments to the United States Constitution.

6. Respondents allege that Disciplinary Rule 2-101(B) on its face and as enforced violates the First, Sixth and Fourteenth Amendment rights of potential clients to receive information concerning the availability and cost of legal services.

7. Respondents allege that Disciplinary Rule 2-101(B) on its face and as enforced violates Respondents' Fourteenth Amendment right to equal protection of the laws in that it generally prohibits advertising by attorneys

in private practice but permits advertising by qualified legal assistance organizations, and permits attorneys involved in political or (2) organizational activities to publicize themselves as attorneys.

8. Respondents allege that Disciplinary Rule 2-101(B) on its face and as enforced violates Respondents' Fourteenth Amendment right to due process of law in that its prohibitions are so vague as to be incapable of informing a person of normal understanding what is prohibited and what is not.

9. Respondents allege that Disciplinary Rule 2-101(B) on its face and as enforced constitutes a violation of 15 U.S.C. §1 (Sherman Act) in that it is an instrumental part of a combination and conspiracy to restrain interstate trade and commerce in the practice of law, and interstate trade and commerce which depends upon the practice of law.

10. Respondents allege that Disciplinary

Rule 2-101(B) on its face and as enforced constitutes a violation of 15 U.S.C. §2 (Sherman Act) in that it is an instrumental part of a monopoly and attempt to monopolize interstate trade and commerce in the practice of law.

11. Respondents allege that Disciplinary Rule 2-101(B) on its face and as enforced constitutes a violation of Ariz. Rev. Stat. §44-1402 in that it is an instrumental part of a combination and conspiracy to restrain trade or commerce in the practice of law.

12. Respondents allege that Disciplinary Rule 2-101(B) on its face and as enforced constitutes a violation of Ariz. Rev. Stat. §44-1403 in that it is an instrumental part of a monopoly or attempt to monopolize trade or commerce in the practice of law.

13. Respondents allege that the State Bar disciplinary hearing procedures under which Respondents' case is being heard violate Respondents' rights to due process of



law under the Fourteenth Amendment in that initial hearings and first review are conducted by practitioners interested in the outcome of the case by reason of their engagement in the private practice of (3) law in competition with Respondents and others who may wish to advertise.

WHEREFORE Respondents pray that this proceeding be dismissed.

Dated March 23, 1976

By: William C. Canby, Jr.  
Attorney for Respondents

\* \* \* \*

STIPULATED PRETRIAL ORDER  
(Title omitted in printing)  
(Dated March 25, 1976)

The parties respectfully request that the Disciplinary Committee enter a pretrial order as follows:

1. There is no dispute that Respondents violated Disciplinary Rule 2-101(B), and no evidence need be taken on the question of

whether they caused the particular advertisement to be printed.

2. The Respondents stand on their position that the rule is invalid and not properly enforceable, while the complainant takes the opposite view. The parties also differ as to the validity of the disciplinary procedure. The views of the parties in these respects have been set forth in memoranda already filed. Without in any respect waiving their positions, the parties waive oral argument on these questions, and stand on their positions as taken in writing.

3. The parties request the Committee to allow up to a day for the taking of evidence on this matter. The parties will work out for themselves a reasonable allocation of time to their mutual satisfaction. The State Bar of Arizona will produce for cross-examination the president of the State Bar of Arizona and the Respondents will produce for

cross-examination the two individuals against whom complaint has been made.

(2) 4. Both parties waive objections as to both foundation and relevance as to any exhibits either side may wish to offer or any live testimony either side may wish to develop. In so doing, the parties are not acknowledging that any particular item of evidence is, in fact, truly relevant to the case. The object is, rather, to permit a record to be made which will permit each side to feel that it can fairly present its contentions both here and in other tribunals to which this matter may pass. Each party reserves the right to contend that whatever evidence does come into the record may be of no weight or persuasiveness. This stipulation reflects the wish of the parties not to consume time over points of evidence. Each side does, however, reserve the right to object to what it may regard as prejudicial leading or

excessive hearsay, agreeing that any question of hearsay shall be passed upon in terms of whether the contested material has any persuasive value.

5. The parties request the speedy production of a transcript. They reserve the right to request at the close of the hearing the possibility of submitting supplementary memoranda.

LEWIS & ROCA  
By: Orme Lewis and  
John P. Frank  
Attorneys for The  
State Bar of Arizona

By: William C. Canby, Jr.  
Attorney for Respondents

\* \* \* \*

(3)

ORDER

The foregoing stipulation is accepted and adopted as a pretrial order. This matter shall be heard on the 7th day of April, 1976, at 1700 First National Bank Plaza at

1:00 o'clock p.m.

Dated: March 25, 1976

By: Philip von Ammon,  
Chairman

\* \* \* \*

SPECIAL LOCAL ADMINISTRATIVE COMMITTEE  
OF THE  
STATE BAR OF ARIZONA  
FOR  
DISTRICT NO. 5

In the Matter of a Member of )	
The State Bar of Arizona )	
	)
JOHN R. BATES and )	No. 76-1-S16
VAN O'STEEN, )	
	)
Respondents. )	
	)

TRANSCRIPT OF PROCEEDINGS

\* \* \* \*

(4)

THE CHAIRMAN: This is the time and place set for the hearing of the Special Local Administrative Committee of the State Bar of Arizona for District No. 5

in the matter of a Member of the State Bar of Arizona, John R. Bates and Van O'Steen, Respondents, No.: 76-1-S16.

The Members of the Administrative Committee being Carl Divelbiss, Mr. Ivan Robinette, and Mr. Philip von Ammon are present.

I'd like to hear the appearance also on behalf of the parties.

MR. FRANK: For the Complainant, my partner, Mr. Orme Lewis will join me in a moment. I will proceed, however, in the meantime I'm John P. Frank, and I have with me on table and am receiving papers from a paralegal assistant, Miss Lee.

THE CHAIRMAN: Mr. Canby?

MR. CANBY: My name is William C. Canby, Jr. I'm attorney for both Respondents, Mr. Bates and Mr. O'Steen.

(5) THE CHAIRMAN: I'd like to have the

original handed to the court reporter, who will mark it as Bar Exhibit No. 1, if there is no objection, Mr. Canby.

MR. CANBY: No objection.

THE CHAIRMAN: It may be received.

(Document marked Bar Exhibit No. 1 for identification by the Notary, and received in evidence.)

MR. FRANK: As Bar Exhibit No. 2, I advise the panel that we have made certain inquiries, as particular questions to some 14 Phoenix law firms. The answers have been compiled into Exhibit 2. We have stipulated that Exhibit 2 may be admitted and that the underlying letters will be maintained in our office, should either Mr. Canby or this panel or any later person reviewing the matter have any desire at any later time to have access to them. We have in this Exhibit substituted anonymous terms for (6) the names of the firms answering the particular questions, al-

though, we have listed the firms, and we have stipulated that that may be done.

It is further stipulated between us that we have offered these persons for cross-examination. The other side waives cross-examination.

It is stipulated that the appropriate partners from each of these firms would give these answers to these questions if they were asked orally.

Mr. Canby, have I fairly stated our stipulation?

MR. CANBY: Yes. So stipulated.

MR. FRANK: I offer the original of this as Bar Exhibit No. 2, and give copies to each member of the panel.

(Document marked Bar Exhibit No. 2 for identification by the Notary.)

THE CHAIRMAN: Bar Exhibit No. 2 may be received in evidence, subject to the stipulation of the parties as stated for the



record by Mr. Frank.

(Bar Exhibit No. 2 received in evidence.)

MR. FRANK: There is a further stipulation I should have mentioned. One of the 14 firms which has answered the questionnaire is Lewis and Roca, of which I am a member. So, as to be scrupulously careful to avoid any problem about being both witness and counsel in the same (7) matter, Mr. Canby has stipulated with me that Lewis and Roca might give answers to the questions; that they might be included and I might nonetheless appear with Mr. Lewis as counsel, and there would be no prejudice on this to the other side; the answers being strictly informational in any way.

Mr. Canby, have I fairly stated that?

MR. CANBY: So stipulated.

THE CHAIRMAN: In view of the stipulation, the Respondents waive the right to examine any persons who are spokesman on

behalf of these firms, would seem to me, you wouldn't be under any liability anyway, Mr. Frank.

MR. FRANK: Now, we have taken a number of depositions -- indeed, most of the testimony is probably in deposition by now. I tender to the reporter the originals of the deposition of Doctor Helme and Robert Begam, noting simply by way of identification that Doctor Helme testified concerning the professional ethics of the medical profession, for such bearing as that may have on this case, and Mr. Begam testified in his capacity as president-elect of the American Trial Lawyers Association.

THE CHAIRMAN: Very well, the Deposition of Robert Begam will be marked as Exhibit No. 3, and if there is no objection, the deposition will be received in evidence.

(8) Is there any objection to the

receipt of Deposition of Robert Begam, Exhibit No. 3?

MR. CANBY: No objection, subject, of course, to our stipulation.

MR. FRANK: Yes. Our stipulation, I will note, again, for the panel, it is: Since this is not a jury case, that you will give such weight as it deserves to any portion of the materials. That's all.

MR. CANBY: No objection.

(Deposition of Robert G. Begam, Esquire, marked Bar Exhibit No. 3 for identification by the Notary.)

THE CHAIRMAN: Very well, Exhibit No. 3 will be received.

(Bar Exhibit No. 3 received in evidence.)

THE CHAIRMAN: The deposition of William Helme, H-e-l-m-e may be marked Exhibit No. 4 and may be received subject to the same stipulation.

(Deposition of William Helme, M.D. was marked Bar Exhibit No. 4 for identification by the Notary and received in evidence.)

MR. FRANK: Next, Mr. Mark Harrison, the President of the Arizona State Bar was that in a technical sense perhaps this is his deposition, but I had considerable direct, and I'd ask leave to offer it by stipulation, as Bar Exhibit next in (9) number.

THE CHAIRMAN: Any objection, Mr. Canby?

MR. CANBY: No objection.

THE CHAIRMAN: It may be received.

(Deposition of Mark I. Harrison, Esquire was marked Bar Exhibit No. 5 for identification by the Notary, and received in evidence.)

MR FRANK: A point of information, Mr. Chairman, I hold a copy of the advertisement which is the subject of this case. It is attached to the Complaint. Is there any point in having it marked, especially as an Exhibit, as well?

THE CHAIRMAN: Yes.

MR. FRANK: All right. I offer the advertisement as the Exhibit next in number.

THE CHAIRMAN: That's Bar Exhibit No. 6. Absent any objection, it may be received.

MR. CANBY: No objection.

THE CHAIRMAN: If you can figure out some evidentiary (sic) grounds to exclude it, Mr. Canby, I'd certainly be interested in your expose.

MR. CANBY: Especially since it's been admitted in our Answer.

(Copy of ad marked Bar Exhibit No. 6 for identification by the Notary and received in evidence.)

(10) MR. FRANK: Mr. Chairman, I now offer as the next three Exhibits three documents relating to the profession of accounting, which will be taken up in the course of testimony by Mr. Davidson, but since they will be admitted by stipulation, I present them at this time.

THE CHAIRMAN: I'd like to have them marked separately. You can choose the order, I don't care, but tell us what it is.

What is no. 7?

MR. FRANK: No. 7 is the "restatement (sic) of the Code of Professional Ethics" of the accounting profession.

THE CHAIRMAN: Any objection?

MR. CANBY: Let me take a quick look at those.

MR. FRANK: (Presenting)

MR. CANBY: No objection.

THE CHAIRMAN: Seven may be received, subject to stipulation of the parties.

(Booklet marked Bar Exhibit No. 7 and received in evidence.)

THE CHAIRMAN: No. 8?

MR. FRANK: These are the "Rules and Regulations" of the "Arizona State Board of Accountancy".

(Booklet marked Bar Exhibit No. 8 for



identification by the Notary.)

THE CHAIRMAN: Any objection to that, Mr. Canby?

(11) MR. CANBY: Again, may I see that for a moment?

THE CHAIRMAN: Certainly.

MR. CANBY: No objection.

THE CHAIRMAN: It will be received.

(Bar Exhibit No. 8 received in evidence.)

THE CHAIRMAN: No. 9?

MR. FRANK: No. 9 is an excerpt from what Mr. Davidson will identify as the standard text on the "Ethical Standards of the Accounting Profession" by Messrs. Carey and Doherty.

MR. CANBY: No objection.

THE CHAIRMAN: Did you say you had no objection, Mr. Canby?

MR. CANBY: No objection.

THE CHAIRMAN: Bar Exhibit No. 9 may

be received in evidence.

(Copy of excerpt marked Bar Exhibit No. 9 for identification by the Notary, and received in evidence.)

MR. FRANK: Exhibit 10, I'm told, by inadvertence is not in the room, but I'm told it will be brought in. I ask to hold the number. What it is is the revised disciplinary rule relating to discipline of the American Bar Association as adopted by the House of Delegates in February of this year, and by oversight it was not brought into the room.

(12) May I hold the number for that purpose and tender it as rapidly as it's brought in?

THE CHAIRMAN: You certainly may.

\* \* \* \*

LYMAN A. DAVIDSON, being sworn as a witness by the Chairman, was examined and testifies as follows:

(13)

## EXAMINATION

By Mr. Frank:

Q. Mr. Davidson, until recently you have been engaged in the profession of public accountancy, I believe?

A. Yes.

Q. I think you have just retired; is that right?

A. September 30th.

Q. With what firm were you associated?

A. I was partner in charge of Ernst & Ernst, here at Phoenix.

Q. For how many years had you been in that position?

A. Well, I opened the office 16 years ago, and the one in Tucson 14 years ago.

Q. So that you were the officer in charge for the entire state; is that correct?

A. That's correct.

Q. Had you been in the profession of

accountancy prior to that time?

A. I had been in totally for 32 years, in which seven was on my own account.

MR. FRANK: Mr. Canby, I don't want to spend time needlessly on further foundation. May we have a stipulation that Mr. Davidson is an expert in the field of accounting?

(14)MR. CANBY: Yes.

THE CHAIRMAN: You didn't specifically establish whether he was a certified public accountant.

MR. FRANK: Thank you.

Q. BY MR. FRANK: Mr. Davidson, are you a certified public accountant?

A. Yes.

Q. For how many years have you been?

A. I think that that figure would be around 30 years.

Q. Mr. Davidson, is there some national organization in the field of pub-

lic accounting?

A. Yes.

Q. What is that organization?

A. The American Institute of CPA's.

Q. Are you a member of that organization?

A. Yes.

Q. Is there also a state organization?

A. The Arizona Society of CPA's.

Q. What proportion of the members of the accounting profession; that is to say of the certified public accountants of the state are members of the state association?

A. I don't have an exact figure available.

Q. Approximately?

A. Approximately 75 percent.

(15) Q. What offices, if any, have you held in the state profession -- state association?

A. I have been a member of the Ethics

Committee; a number of other committees, and served on the Board of the Society for a number of years, including the last one as president.

Q. Mr. Davidson, in addition to these two organizations, which I take it are voluntary organizations -- is that correct?

A. That's correct.

Q. -- is there also some state regulatory agency in the field of accounting?

A. The State Board of Accountants.

THE CHAIRMAN: Excuse me, Mr. Frank. The record will show that Mr. Orme Lewis appearing as additional counsel or associate counsel for the State Bar has joined us in the room.

MR. LEWIS: My apologies.

Q. BY MR. FRANK: Mr. Davidson, I believe the answer you just gave me is that there is something called the State Board of Accountancy; is that correct?



A. Yes, that's correct.

Q. And the State Board of Accountancy is, briefly speaking, what?

A. It's a regulatory state agency.

(16) Q. Established under state law?

A. Correct.

Q. I show you what has been marked into evidence as Exhibit 8, headed, "Arizona State Board of Accountancy Rules and Regulations", and ask you what that is? (Presenting).

Mr. Davidson, are those the regulations of the accounting profession?

A. These are the Rules and Regulations of the Arizona State Board of Accountancy.

Q. Have you had any official organization capacity with that organization?

A. I was a member of the State Board, which ended last year, June '74 -- or '75. I was president of that group.

Q. Mr. Davidson, does not the organization of accountants have some code of

professional ethics of some sort?

A. Yes, sir.

Q. I will show you what has been marked into evidence as Exhibit No. 7, and will ask you if that is a copy of what is called a "restatement (sic) of the Code of Professional Ethics" which is commonly used in your profession?

A. It is, sir.

(17) Q. Now, how, if at all, does that national code relate to the code, if there is one, in the State of Arizona?

A. They are very similar, if not identical.

Q. Would you explain, please, how this is achieved?

Is the national code adopted by the state organization?

A. That is correct. If they so desire.

Q. Has it been so adopted in this state?

A. It has been in this state.

Q. In addition to this, is it also adopted by the State Board of Accountancy?

A. Yes.

Q. So that in other words, the very same rules become national standards, state standards, and then state regulations, as well; is that correct?

A. That is correct.

Q. Are you generally acquainted with the system by which the American Bar Association drafts standards of ethical conduct for lawyers?

A. In general, yes.

Q. Are you acquainted with the fact that subject to such modifications as it may think appropriate, the State Supreme Court then adopts those rules or canons for the governance of lawyers in the State of Arizona?

(18) A. Yes, sir.

Q. Is the procedure by which the State

Board of Accountancy adopts the accounting rules of the national organization essentially analogous to the procedure with which the State Supreme Court adopts the rules for the profession of lawyers?

A. I would say essentially the same.

THE CHAIRMAN: Mr. Frank, are you undertaking to establish that the National Code of Professional Ethics for the Profession of Accountancy, by virtue of the adoption by the State Board of Accountancy has the force of law in this state?

MR. FRANK: I wish to show that it has the force of law, which will make it different from some of the other professions, but like that of the legal profession; then, go into its contents, yes.

THE CHAIRMAN: Okay.

Q. BY MR. FRANK: Now, Mr. Davidson, is there some provision in the "restatement" which is before you which deals with the topic of advertising?

A. Yes.

Q. And you have obviously told me about this in advance. I believe it's Section -- well, I don't know. What Section is it? You have it.

A. I beg your pardon. Are you referring --

(19) Q. -- to the provision dealing with solicitation and advertising in the booklet, which is now in your hands, the "restatement" of the national code.

THE CHAIRMAN: That's Bar Exhibit No. 7.

MR. FRANK: Thank you.

A. If I may read from it --

THE CHAIRMAN: What rule number?

THE WITNESS: "502 Solicitation and advertising".

"A member shall not seek to obtain clients by solicitation. Advertising is a form of solicitation and is prohibited."

Q. BY MR. FRANK: Mr. Davidson, I

now show you Exhibit 9, which is the extract from the works of Carey and Doherty on "Ethical Standards", and will ask you what that is?

Who are Carey and Doherty?

A. I beg your pardon. John Carey was the highly respected Executive Director of the American Institute for CPA's for 20 or 30 years, and in the opinion of my peers in the accounting profession, was probably one of the most knowledgeable people about the accounting profession, because of his long association.

Q. I take it the second author is someone associated with him?

A. He was an associate, correct.

(20) Q. In the extract which you have before you, there is some textual expansion of just what advertising is, as what is prohibited; is that correct?

A. That's correct.

THE CHAIRMAN: That's Bar Exhibit No.



9 which the witness is referring to?

MR. FRANK: Yes, Bar Exhibit No. 9.

Thank you.

Q. BY MR. FRANK: Mr. Davidson, does the State Board of Accountancy in its capacity as the disciplinary body for accountants deal with cases of accountants who are charged with having violated the rules of which we speak?

A. Yes.

Q. And take, for example, a recent year, 1974 -- I believe you gathered the figures as to the number of cases that came before your board concerning solicitation or advertising in that year; didn't you?

A. Yes.

Q. You are free to look at your notes.

A. May I look at my notes on that?

Q. Yes. Tell us what actually happened in a given year on that score?

A. The year 1973, the board considered

26 complaints concerning solicitation and advertising. That would be exclusive of so-called advertising in the Yellow Pages or the Telephone Book. Those were considered to be minor.

(21) The figures given to me this morning by the current Executive Secretary of our State Board said that in 1974 we revoked one certificate and censured another firm.

Q. Mr. Davidson, for how long has your profession had a written rule prohibiting solicitation and advertising?

A. My authority is Mr. Carey's book, and he states that the Rules of Ethics have been under an evolutionary for the past 70 years; and my 32 years in accounting, certainly, there has been this prohibition. I can't give you the exact date that it was adopted.

Q. Is the prohibition on advertising generally honored in the profession?

A. No question about it, sir. Yes.

Q. So that in your many years in this state, have you ever seen, for example, a newspaper ad by an accountant?

A. No, sir.

Q. So, as far as you know, has there ever been one?

A. So far as I know, there never has been one.

Q. What becomes, then, of the young accountants who come to the community and who wish to develop their professions?

How do they do that?

(22) A. Well, they seem to have no difficulty. I don't know of any accountants who, because of his inability to advertise has ever had to go out of practice.

Q. In short, has it been your observations that young accountants come to this community and so, in fact, get professionally started without any particular difficulty?

A. Yes, sir.

Q. And that's a widespread generalization?

A. If I may say so, Mr. Frank, we do require in this state two years of experience in a CPA firm, after passing the examination and, of course, that means that these people not only do, but must pursue that course, so that that gives them an opportunity, if I may say so, to go out in practice on their own.

THE CHAIRMAN: Do you mean they have to work for a firm of CPA's before they receive their own certificate?

THE WITNESS: That's correct, before they receive a license to practice. Certificate is correct.

THE CHAIRMAN: All right.

Q. BY MR. FRANK: Mr. Davidson, do you regard advertising as desirable for your profession?

Would this be a helpful innovation,

in your opinion?

A. I would say it would be a disaster.

(23) Q. How would the public interests be disserved if you were to repeal or abrogate your rules of ethics in this respect?

THE CHAIRMAN: Did you say "served" or "disserved"?

MR. FRANK: "Disserved". Thank you.

A. I think the public would be disserved, because the idea is to have the public to understand that we in the profession know we have a code of ethics that is to their best interest.

Q. BY MR. FRANK: Would you be concrete about that?

Just where would the harm be if the accounting firms were to put ads in the paper saying, audit so and so much per hour, or some other kind of commercial display of that type?

A. Well, again, I think I should go back to the point that at one time the accountants were not engaged as a profession. This would have been in the early 1900's, and they found out at that time that they would not be considered anything other than businessmen, unless they did have a complete set of rules of conduct.

Q. How is the accountant different from a businessman, as you have just used the phrase?

A. Well, first of all, I think we are distinguished from the businessman by reason of the fact that we must be absolutely independent. We may be engaged by a client (24) and find that his books are not in good order, and so state, for the benefit of the public.

We do serve the public, basically. I think that distinguishes us from any businessman.

Q. And that public service to which



you describe, by virtue of your independence, do you have an opinion as to how that would be affected if you advertise and solicited and went out looking for business?

A. Well, I think anytime you advertise you imply that some kind of a profit motive -- that your first obligation is not to the public, it is to yourself, to make a profit. That is my feeling, and the way it would be taken.

I think the public, over this period of 70 years has been educated to the fact that accountants do not solicit or advertise, and it would be degrading to the profession and not in the best interest of the public if they did.

Q. I take it it is your opinion it could be incompatible or it would be incompatible with the independence of your audit if you hustled the business in the first place?

A. No question about that.

MR. CANBY: Excuse me. Was that intended to be a restatement of his testimony?

(25) MR. FRANK: I'm trying to find out what it is that he is saying.

Q. BY MR. FRANK: So, let me ask: Was that a restatement of your testimony?

A. I would say yes. In fact, I'm willing to say it again: I'm saying it would certainly reflect upon the independence of the accountant if we were to put ads in the paper or solicit in any other form.

THE CHAIRMAN: Mr. Canby, for the sake of the record, I believe that Mr. Frank did, in essence, restate the nub of Mr. Davidson's testimony. I think that the thrust of it was that he believes that the independence of the accountant, and therefore the objective of their audits would be threatened or jeopardized by advertising.

What I have not heard yet is why he

believes that to be true; just what the causal connection is between the two.

Q. BY MR. FRANK: Why do you believe that to be true, Mr. Davidson?

A. Well, it seems to me it is self-evident that if you advertise your attainments, your independence is absolutely subject to question.

Q. Are you able to expand on that any further for the benefit of Mr. von Ammon and the record, of course?

A. Is it permissible --

(26) Q. I think you have the volume -- I'm aware that you have been prepared for this testimony, and a passage of Mr. Carey's book appeals to you and a better statement than your own statement. I'm sure you can have access to it.

MR. CHAIRMAN: That's fine. Will you tell us the page number?

Q. BY MR. FRANK: Do you want to pull out the book itself? I don't think we

Xeroxed that page.

A. Page 47, which is an Exhibit here.

Q. Is that the passage that we duplicated?

A. Yes. Section 28, page 47.

MR. DIVELBISS: What Exhibit?

THE CHAIRMAN: Exhibit No. 9, Carl.

MR. FRANK: Since it is very short, would you mind, Mr. von Ammon, so that if the record ever gets disassociated from the Exhibit, it can be readily understood; may I ask Mr. Davidson to quote the passage which I take it he relies upon?

THE CHAIRMAN: Certainly.

Q. BY MR. FRANK: Would you do that?

A. "The general prohibition against advertising is accepted today without much question. To be sure, there is nothing illegal or immoral about advertising as such, but it is almost universally regarded as unprofessional."

(27) "Younger accountants are some-

times tempted to advertise or solicit, and they may suspect that the rules are a result of a conspiracy among their older colleagues to protect themselves against new competition."

"Actually, the rule against advertising has many sound reasons to support it. In the first place, advertising would not benefit the young practitioner. If it were generally permitted, the larger, well-established firms could afford to advertise on a scale that would throw the young practitioner wholly in the shade. Secondly, advertising is commercial. Professional accounting service is not a tangible product to be sold like a commodity. Its value depends on the knowledge, skill and honesty of the CPA. Who would be impressed with a man's own statement that he is intelligent, skillful and honest? Lastly, advertising does not pay."

This may be a direct conflict with

some other testimony, but that's the way we feel about it. And that's it.

Q. But there is another passage. This will be my next question.

In the volume which you have at your side, there is, I think, near the beginning of it a passage dealing with the concept of the independence of the accountant and the relation of that independence in ethics.

(28) THE CHAIRMAN: This is from the same work from which Exhibit 9 has been extracted?

THE WITNESS: Yes.

Q. BY MR. FRANK: Am I correct in my memory of that point, Mr. Davidson?

A. Concerning advertising?

Q. No, the relationship of ethics, generally, to the accountant's independence, or is my memory at fault?

A. Well, I think I would have to say that as far as this volume is concerned, the matter of independence is discussed



thoroughly. It's certainly a major part of our Code of Professional Ethics, but as far as relating this to advertising, I think I'd have to stand on the testimony that I have given to date.

Q. Do you adopt as your own the statements by Mr. Carey, as to your views?

A. I do.

MR. FRANK: That's all I have.

THE CHAIRMAN: Mr. Canby.

\* \* \* \*

#### EXAMINATION

By Mr. Canby:

Q. Mr. Davidson, did I understand your point to be that a beginning accountant here in his two years of service in a firm has an opportunity to develop clients (29) from that contact?

A. Oh, I think that opportunity exists. If I may refer to your term "beginning accountant", I'm referring to the man who has passed the CPA exam in the State of Arizona

and must serve his two years under a CPA.

Now, we obviously have reciprocal privileges with other states. A man from another state, in other words, provided he meets the specifications of the State Board of Accountancy can enter practice in this state, and many do.

Q. You don't know of any certified public accountants who have simply been unable to attract a viable clientele here in Arizona?

A. No, not to my personal knowledge.

Q. Is there more certified public accountant business than can reasonably be handled?

A. I think it is becoming that way.

Q. I realize it's a general question, but what is the general nature of the certified public accountant business that you get? What kind of clients would you do business for?

A. We would do business, I think,

for almost all kinds of clients in a national firm, which we are. General services performed by CPA's are in the area of auditing, tax service and in an area called management (30) services.

The clients would range from small to medium, to large.

The type of service required, of course, would depend upon the type of industry we were talking about.

Q. Are all these clients in some sort of business?

A. No, some are tax clients who are retired.

Q. And the auditings, you mentioned three categories; two of which are auditing and management services?

A. Yes, sir.

Q. Presumably, that would be for people who are engaged in business; is that right?

A. That is correct. I might add; also

point out to you sir, that about 70 percent of the work of a national public accounting firm is in the auditing area, which requires the independence factor.

Q. About 70 percent?

A. Yes.

Q. Thank you. Are you familiar, Mr. Davidson, with a letter of the Arizona Attorney General to the State Board of Accountancy in regard to advertising? It's dated September 19, 1975.

MR. CANBY: May I have this marked?

THE CHAIRMAN: Yes. What we will do is to (31) continue with the numbers seriatim, and we will identify this as Respondents' Exhibit No. 11.

MR. FRANK: Why don't I put in 10 right now, as long as we are at a break? May I do that? It's here.

THE CHAIRMAN: Yes. Bar Exhibit 10 is the revised disciplinary rule relating to the advertising, adopted by the House of

Delegates by the American Bar Association.

MR. FRANK: Yes. I would like to note for the record, I put it in because it is applicable here. It has not been adopted by our Supreme Court, but simply for the completion of the record, that if it should be useful at any point.

THE CHAIRMAN: With that avowal, I guess there is no objection.

MR. CANBY: I have a question or two. I have no objection.

The question is whether this is effective; whether there is any action of the House of Delegates or the American Bar Association required to make it official ABA policy?

MR. FRANK: It's my understanding that is official ABA policy, by virtue of the action of the House of Delegates.

THE CHAIRMAN: Do you have any different understanding, Mr. Canby?

(32) MR. CANBY: I have no knowledge of a difference. I had simply heard some-

where that there was one more meeting in which they have to consider it by the House of Delegates, as a whole. I may well be in error.

THE CHAIRMAN: Before the record is closed, can we get some kind of a stipulation between the parties with respect to this fact?

I think it can be determined by inquiring of some person who is knowledgeable in the ABA organization.

MR. CANBY: I'd be happy to stipulate to it on the basis of a telephone inquiry or anything else.

THE CHAIRMAN: We will receive the stipulation later on, once we know what the facts are.

In the meantime, Bar Exhibit 10 may be received.

(Document marked Bar Exhibit No. 10 for identification by the Notary and received in evidence.)



THE CHAIRMAN: Now, No. 11 has been described as --

MR. CANBY: -- a letter from the Attorney General of Arizona to the Arizona State Board of Accountancy, September 19, 1975, reported in the 1975-2 "Trade Regulation Reports".

Do you want to mark this?

I'll be happy to offer it in evidence.

MR. FRANK: I'd like to have it put in evidence.

THE CHAIRMAN: Do you have any objection to (33) offering it in evidence?

MR. FRANK: No.

THE CHAIRMAN: Very well, Respondents' Exhibit No. 11 may be received in evidence.

(Document marked Respondents' Exhibit No. 11 for identification by the Notary and received in evidence.)

THE CHAIRMAN: Mr. Davidson, I am placing in front of you Respondents' Exhibit No. 11.

THE WITNESS: May I take time to read it?

MR. FRANK: I believe this was issued subsequent to Mr. Davidson's retirement, on July 7th.

MR. CANBY: I gather that is correct.

Q. BY MR. CANBY: You left in July of '75?

A. That's correct.

Q. I think any knowledge of that would be indirect. I think you had heard of it or were aware of it?

A. I am aware, sir, that they did eliminate our rule against competitive bidding. The rule as stated previous to that was that there would be a prohibition against competitive bidding on a price basis.

Nevertheless, the accounting profession has always said that the client is entitled to be informed of the amount of the fees for the engagement. It was our position at the time the best qualified firm should be select-

ed; fee discussions should be held. If the client (34) were dissatisfied, he could call on the next qualified firm.

The Attorney General said, yes, that the competitive bidding rule of the state is illegal. I have not seen the opinion. If it refers to advertising, I was not aware of that.

Q. I'm sorry. Competitive bidding is what I meant. I misspoke, and I apologize.

A. Without reading it, Mr. Canby, may I ask you: Is advertising mentioned in here?

Q. No, it is not, to my knowledge. I misspoke. I'm sorry about that.

A. It is true.

MR. FRANK: What question is before the witness, Mr. Canby? I'm mixed up.

MR. CANBY: The question is: Was he familiar with the Attorney General's letter on competitive bidding.

THE WITNESS: Yes.

MR. CANBY: He has testified that the rule has since been abandoned.

Q. BY MR. CANBY: Was it a part of the ethics of either the national or state association that there not be competitive bidding?

A. This has a long history, going back some years.

The American Institute of CPA's did have a rule (35) against competitive bidding, and by agreement, as I understand it, that the Justice Department did eliminate the rule from their Code of Ethics. They, also, at the same time stated that as to what the states did would be entirely determined by state law.

The State of Arizona, up until this ruling, has maintained a competitive bidding rule; prohibition against it, and I guess I would have to correct my former testimony -- this is one departure from the rule of ethics that we have in Arizona, as compared with the American Institute, which I readily concede.

Q. What was the reason behind the

ethical prohibition on competitive bidding?

A. The basic reason is that we believe very strongly, and still do -- most of us in the profession -- I cannot speak for everybody -- that the quality of service will definitely suffer; the clients will also suffer, because the quality of service will go down.

Q. That is your view?

A. That is my view, and I am joined in that view and have been for seven years by at least the members of the Board of Accountancy and by many others in the profession.

As a matter of fact, sir, that view was held by the American Institute for many, many years.

(36) Q. I so understand.

Lastly, you do agree, don't you, there is a profit motive in the business of accounting, or the profession of accounting, as well as other motives?

A. I do not disagree with the statement that the profit motive exists, but that is not of a basic motive in public accounting. The basic motive is, frankly, service to the public.

MR. CANBY: I have no further questions.

MR. FRANK: I have no questions.

May the witness be excused?

THE CHAIRMAN: Well, wait just for a second, please.

For the record, it appears to me from examination of Bar Exhibit No. 8, which is the Rules and Regulations of the State Board of Accountancy that the rule to which the Attorney General's opinion, which has been marked Respondents' Exhibit 11 refers is Rule 9-E(6), which is captioned "Competitive Bids". Is that the rule which appears to have been stricken down by the Attorney General?

THE WITNESS: That's correct. Yes, Mr. Chairman.



THE CHAIRMAN: Could I ask a question of the witness, for clarification?

MR. FRANK: May I send that Exhibit out to be duplicated, or do you need it for your question?

(37) THE CHAIRMAN: No, I don't need it.

\* \* \* \*

#### EXAMINATION

By The Chairman:

Q. Mr. Davidson, are you generally familiar with the function of the community organization which is generally referred to as the Legal Aid Society?

A. Yes, in general.

Q. Are you familiar with what is known as the Lawyers Referral Service?

A. Yes, to some extent.

Q. As I understand it, the Legal Aid Society is an organization which attempts to provide for delivery of legal services to indigent persons, and the Lawyer Referral

Service is a service which purports to provide access to lawyers for potential clients who are not indigent and who are guaranteed the opportunity to have legal services at some kind of a stipulated initial consulting fee, with an arrangement for making agreements on compensation after the initial consultation.

Do you understand that?

A. Yes.

Q. Does the accountancy profession have any kind of an activity which is comparable either to Legal Aid or to Lawyer Referral that will make the services of the (38) profession available either to indigent or to persons who have no access to accountants?

A. I would say to a certain degree that is true. We have in our Arizona Society of CPA's a committee which lends aid to minority groups on a for-nothing basis. There is no charge, and various firms have

contributed the time of their people to efforts of this kind.

In addition, a great many of our charitable organizations have benefited from the services of CPA's at either no cost or a very low cost on the auditing or other standpoints.

As far as referrals go, we do not have a standard process of referrals. However, we do have an executive secretary, and I checked with him very recently -- like this morning -- and said, "How many calls do you receive?"

And he said, "Quite a few."

I said, "What do you do?"

He said, "I ask them basically what their problem is; where they are located, geographically, and we will give them the names of three firms to call, three accounting firms. Also, present them with a roster, which we have of all of the ones that are listed in the Board of Accountancy Di-

rectory."

We do have that type of referral.

(39) He also makes it clear that they should discuss the fee with the accounting firm before they do, and the flat question, check the quality of their service before they engage any services with them.

Q. The other question that I have is whether members of your profession, among other services, also provide tax advice and assist in the preparation of state and federal income tax returns?

A. Yes, sir.

Q. I think we are all generally familiar with the activities of an organization called H & R Block. Do they engage in furnishing tax advice and the preparation of income tax returns?

A. Yes, they do.

Q. Do they advertise?

A. They do.

Q. Are they certified public account-

ants?

A. They are not.

Q. If they were, in fact, CPA's, would that advertising be a violation of the Code of Professional Ethics?

A. Very definitely.

THE CHAIRMAN: That's all I have.

THE WITNESS: I'm hopeful, if I may say so, that we, in no way, as an accounting profession, would be (40) considered at the same level of H & R Block.

THE CHAIRMAN: I'm not going to draw any inferences as to which is at the higher level, but they are not equivalent; is that true?

THE WITNESS: Right.

THE CHAIRMAN: Thank you.

MR. FRANK: May Mr. Davidson be excused?

THE CHAIRMAN: You may be excused, and thank you very much for your assistance.

MR. FRANK: Mr. Canby and I are now

able to stipulate that the action of the House of Delegates is the official and binding action for the American Bar Association as to Exhibit 10.

THE CHAIRMAN: So, as of right now, Bar Exhibit No. 10 constitutes the final official, binding action of the American Bar Association?

MR. FRANK: That is correct.

THE CHAIRMAN: But it is not a part of the body of law of this state until such time, if any, as the Supreme Court incorporates it into their rule.

MR. FRANK: That is correct.

Right Mr. Canby?

MR. CANBY: Right.

MR. LEWIS: Mr. Chairman, may I be excused for a few (41) minutes?

(Mr. Lewis excused from the hearing room.)

\* \* \* \*



DEPOSITION OF BERNARD VAN O'STEEN, JR.

AND JOHN RICHARD BATES

\* \* \* \*

BERNARD VAN O'STEEN, JR., a Respondent, being sworn as a witness by the Chairman, was examined and testifies as follows:

JOHN RICHARD BATES, a Respondent, being sworn as a witness by the Chairman, was examined and testifies as follows:

THE CHAIRMAN: Now, the rule is you only speak when spoken to, so there isn't suddenly volunteering.

# EXAMINATION

By Mr. Frank:

Q. Mr. O'Steen, would you give us your full name, for the record?

A. BY MR. O'STEEN: Bernard Van O'Steen, Jr.

Q. Mr. O'Steen, are you a member of the Arizona Bar?

A. BY MR. O'STEEN: I am.

Q. And a graduate of the ASU Law School?

A. BY MR. O'STEEN: Yes.

Q. What year?

A. BY MR. O'STEEN: 1972.

(42) Q. Are you engaged in the practice of law in this community?

A. BY MR. O'STEEN: I am.

Q. A member of a firm?

A. BY MR. O'STEEN: Yes.

Q. What is that firm?

A. BY MR. O'STEEN: Legal Clinic of Bates & O'Steen.

MR. FRANK: Now, I will turn, if I may, to Mr. Bates and bring him up to date.

Q. BY MR. FRANK: Mr. Bates, are you also a member of the Arizona Bar?

A. BY MR. BATES: Yes.

Q. Are you a graduate of ASU?

A. BY MR. BATES: Yes, I am.

Q. When did you graduate?

A. BY MR. BATES: 1972.

Q. Are you the Mr. Bates who is the member of the firm just described by Mr.

O'Steen?

A. BY MR. BATES: Yes, I am.

THE CHAIRMAN: Would you be kind enough to state your full name?

MR. FRANK: Thank you.

WITNESS BATES: John Richard Bates.

Q. BY MR. FRANK: Mr. O'Steen, did you or your firm, (43) in fact, cause the advertisement to be published, which is Exhibit No. 6 in this case?

A. BY MR. O'STEEN: Yes, we did.

Q. And you personally were aware of the publication in advance?

A. BY MR. O'STEEN: Yes.

Q. And you approved it?

A. BY MR. O'STEEN: Yes.

Q. Mr. Bates, were you also personally aware of the publication, and did you approve it?

A. BY MR. BATES: Yes.

Q. Mr. O'Steen, would you tell us, please, something about the nature of the

practice of your office?

Describe for us what you do.

A. BY MR. O'STEEN: In a good many ways, our office is like a traditional law office, in that we provide a range of general services of a legal nature to clients who contact us.

We differ perhaps somewhat from some other law firms --

Q. Let me do this: I believe I interrupted you there, because I'd first like to get a description of what the services are, and go into the differences between your clinic, as you call it, and a normal law office.

What are the services?

(44) A. BY MR. O'STEEN: We take cases in the following areas: Divorce and other domestic relations matter; adoptions, which may or may not be included in that first category; individual bankruptcies, wills; probates; change of name matters; personal

injury cases.

I should have included along with probate, the areas of guardianship and conservatorship, which are closely related.

We do some work in the consumer contract area of the law, and a small amount of real estate practice.

THE CHAIRMAN: No criminal practice?

WITNESS O'STEEN: No criminal practice.

Q. BY MR. FRANK: Mr. Bates, is that essentially an accurate description, or do you have anything to add?

A. BY MR. BATES: I believe that covers it.

Q. All right.

Mr. O'Steen, if, hypothetically, a person comes to you for a divorce and would like the names of the children changed in connection with that divorce, do you then handle both of those functions?

A. BY MR. O'STEEN: The names of the

children changed?

Q. Yes. Suppose, hypothetically, somebody comes in for a divorce and is going to have her own maiden name returned; let us suppose she has been married previously (45) and she has a child that has some name other than that of her maiden name; do you then get those names untangled if she asks it, and get those children's names changed?

A. BY MR. O'STEEN: Well, we are fully capable of providing both services. They cannot be done in the same proceedings, but to my recollection, I have never had a request of multiple services of that nature.

Q. But you are perfectly prepared to do that; services of that nature?

A. BY MR. O'STEEN: Yes, assuming there is a legal basis for it.

Q. Let's take the same kind of a divorce; do you, as a matter of routine,



offer the service of a will to anybody who gets a divorce, a new will?

A. BY MR. O'STEEN: No, we do not.

Q. Do you commonly do wills for the people for whom you get divorces?

A. BY MR. O'STEEN: Certainly not commonly.

Q. Do you ever do new wills for the people for whom you get divorces?

A. BY MR. O'STEEN: I would suspect that we do, but it happens so infrequently that I can't recall specifically of specific examples.

Q. But you have no rule against it?

A. BY MR. O'STEEN: No.

(46) Q. If, hypothetically, somebody got a divorce on Monday and asked you for a new will on Tuesday, and alas died on Friday, are you capable of providing probate service in that situation?

A. BY MR. O'STEEN: Yes, we are.

Q. You have no rule against that?

A. BY MR. O'STEEN: None.

Q. What is a legal clinic, as you envision it?

What does that term mean in your title?

A. BY MR. O'STEEN: Well, as I think I started to explain, in response to another question a few moments ago, the term "legal clinic" was adopted by us when we opened our practice, because we believe that it best describes what we are doing. I think unlike some other law firms, we made a conscious effort from the very beginning to extend legal services, quality legal services at the most reasonable fees possible to persons of moderate and low income; people who were not capable of qualifying under the financial guidelines of the Legal Aid Society, and therefore had traditionally had difficulty finding lawyers.

We incorporate a number of cost-

saving features into the practice in order to reduce costs, and thereby, pass along savings in the way of reduced fees in certain types of cases.

(47) Very briefly, the features of the clinic are --

Q. I wish you would describe them.

A. BY MR. O'STEEN: Each of the attorneys in the clinic specialize, and this permits an attorney to bring expertise to the client's problem at a minimum of effort and a most efficient way.

The clinic also employs and makes extensive use of paralegal or legal assistant personnel, who perform many of the functions that attorneys have traditionally done, but have not needed to do; functions which can be performed of equal competence by a non-lawyer personnel. Of course, they don't give legal advice and they don't represent clients in court.

Those are the two most important restrictions on their ability to work, but they do many other chores that attorneys in some other offices do.

THE CHAIRMAN: Could I ask for a clarification, Mr. O'Steen. Are there admitted lawyers in the clinic, other than yourself and Mr. Bates?

WITNESS O'STEEN: Until recently, we had the third lawyer, Mr. von Ammon. She has since left the clinic, and we are hopeful shortly to have another admitted lawyer to take her place, but at the present time there are only two of us.

THE CHAIRMAN: And you employ, as I understand it, (48) some nonprofessional people who provide certain kinds of supportive courses?

WITNESS O'STEEN: That's correct.

THE CHAIRMAN: How many are there of them?

WITNESS O'STEEN: Two and a half at

the present time.

THE CHAIRMAN: All right, thank you.

WITNESS O'STEEN: Now, those are people who function as -- or, a large part of their duties are what we would call paralegal duties. We also have other personnel, but they are not among that group we call legal assistants.

A. BY MR. O'STEEN: (Continuing) One of the most important features of our office, and it goes hand in hand with the use of legal assistants in this kind of practice is that we use -- our approach to the practice of law is one of a systems approach. Many tasks are standardized; techniques which are repetitive are put together in a carefully devised systems by the lawyers, and thereby, legal assistants can perform many of these functions that we have been talking about with good instructional material from lawyers and with periodic reviews by the lawyers,

in important steps along the way.

Various other methods of reducing overhead are used in the office. Clerical time is minimized, for example, by the use of printed legal forms, and by the use of automatic typewriter equipment.

(49) In addition, we don't maintain a large collection of law books. Attorneys do their research at institution of law libraries.

Probably what we consider perhaps the most important feature of the clinic is that a relatively low profit is made on each case.

Q. Mr. O'Steen, I'd like to take these in some detail, so that we really understand the distinction between a clinic, as you envision it, and simply a conventional law office.

Let me put, if I may, the illustration of this office, in which we are taking the testimony. The office has



attorneys who specialize almost entirely; uses paralegals to a great extent; uses, I believe, a systems approach, as you describe it, and uses automatic typewriters extensively; yet, I suppose no one would imagine that this was a legal clinic. You don't suppose that these ingratants make it one?

A. BY MR. O'STEEN: No, sir, I wouldn't say so.

Q. So that those are not essential elements of a legal clinic. At least, they don't define a legal clinic?

A. BY MR. O'STEEN: No, they in themselves don't define a legal clinic.

Q. What, then, are the precise factors which are peculiar to a quote: "legal clinic", which are not (50) common to countless other law offices in this state?

A. BY MR. O'STEEN: Well, first of all, I think your experience, Mr. Frank, insofar as the features you just mention-

ed to me that are used by this law firm are generally not employed by attorneys who handle the kind of cases that we handle; that is, a systems approach to practice; the use of legal assistants, and the like. Those are features that typically can only be used by large law firms who cater to an entirely different clientele.

Q. I want to be sure I understand it, and truly fairly, Mr. O'Steen. If I get what is the concept of the legal clinic, that is basically that you are appealing to low-income personnel, just above the Legal Aid level?

A. BY MR. O'STEEN: Well, low and middle income.

Q. What is the range of the income of the persons you serve?

A. BY MR. O'STEEN: Well, I can make an educated guess for you.

Q. Would you please?

A. BY MR. O'STEEN: From people on

welfare and other forms of public assistance, up to, I would say, very few of our clients probably have family incomes in excess of \$25,000.00 a year.

Q. So, it's from a low level to around \$25,000.00 is the (51) range; is that it?

A. BY MR. O'STEEN: Yes.

Q. If, hypothetically, someone in response to your advertisement felt that he would like those services, but he happened to have an income of \$50,000.00, would he be barred from availing himself of your services because of that fact?

A. BY MR. O'STEEN: Not if his legal problem was of the type we handle.

Q. Any member of the community could come to you; is that it?

A. BY MR. O'STEEN: Yes. We have no income restrictions.

Q. But, at least, you are agreed your goal is to service persons in the

income range you have described; is that it?

A. BY MR. O'STEEN: Yes, that's basically it.

Q. And the second element is that you seek to service them at the lowest feasible fee and small personal profit; is that correct?

A. BY MR. O'STEEN: Yes.

Q. Now, other than those things, is there really any significant difference between your office and really almost any other office?

A. BY MR. O'STEEN: Well, I think that's pretty (52) significant.

Q. It is. We respect it.

Is there anything else, or is that it?

A. BY MR. O'STEEN: Well, there are other smaller features, I think. The efforts to reduce overhead, which I mentioned, in our firm was accomplished by

those things; by minimizing clerical time and by minimizing the expense of a large library are significant, in the terms of the ability we have to reduce fees.

Q. Mr. O'Steen, is the term "legal clinic" a term of art in the legal community?

Is it commonly used in the literature?

A. BY MR. O'STEEN: It's beginning to be.

Q. Is there some publication to which we would go that we would find a regularly established definition?

A. BY MR. O'STEEN: I don't think so. I could give you a bibliography of articles that are published.

Q. Where did you get -- I'm sorry, I was interrupting. Please finish your answer.

A. BY MR. O'STEEN: I was going to say that the term is used widely now by members of the organized Bar in (53) many

areas, where legal clinics are being established by the members of the Bar.

You may know the ABA has a standing now on legal clinics, and will be instituting a pilot project on legal clinics in the very near future. So, the term has fairly wide acceptance, I think, in the legal community.

Q. But there is no particular reference to which you can send us for a definition; is that right?

A. BY MR. O'STEEN: No.

(Mr. Lewis enters the hearing room.)

Q. Mr. O'Steen, how long have you been in business?

A. BY MR. O'STEEN: As a legal clinic?

Q. At the practice as a legal clinic?

A. BY MR. O'STEEN: Two years, in March.

Q. Who would handle this business which you are doing in the community if you didn't handle it?



Do you have any opinion as to that?

A. BY MR. O'STEEN: Sure. I assume that other private lawyers would handle some of it. I suppose that the Legal Aid Society attorneys would handle some of it, and I suppose a good deal of it would be undone.

Q. Let's take, then, those things separately. Some of it, you say, is eligible for Legal Aid treatment?

A. BY MR. O'STEEN: Some of the clients who see us are eligible for Legal Aid.

(54) Q. If they went to Legal Aid, they'd be served for nothing; wouldn't they?

A. BY MR. O'STEEN: Yes.

Q. Nonetheless, you service them and take their money; don't you?

A. BY MR. O'STEEN: Not without informing them that Legal Aid is available to them.

In most cases, they already know us. I am thinking of the area of divorce, which is really the only other area that I know of, other than just purely consultation, which we serve people who are available for Legal Aid. They are informed when they contact Legal Aid there is a six-month waiting period to see a lawyer; some horrendous period.

Most of them are not willing to wait that period of time, and they seek out an attorney who will do the work at a low fee.

Q. But you, in every case where someone is eligible for Legal Aid advise them of that fact?

A. BY MR. O'STEEN: We don't make an inquiry to determine that, but if we sense that a person who comes to the office might be eligible for Legal Aid, I know that I explore that and I'm sure John does too. We call that to their

attention.

As you may know, both of our backgrounds is from (55) the Legal Aid Society.

Q. But this is when you sense; you don't ask if they could get Legal Aid Society somewhere else?

A. BY MR. O'STEEN: No, and I don't know where any other lawyer does that.

Q. And you are saying that the other category would be in other law offices, and you are undoubtedly competing for that work?

A. BY MR. O'STEEN: Exactly.

Q. And the other area are disputes which would never be litigated at all if it were not for you; is that correct?

A. BY MR. O'STEEN: Well, I'm not sure it's fair to categorize it as disputes, as the question categorizes them. I think they are legal matters that would be unresolved and unattended to.

Q. Let's take the matters in your ad. Take the matter of divorces. Do you believe that you are getting divorces for people who would otherwise not be getting divorces if your services were not available?

A. BY MR. O'STEEN: In some cases.

Q. Do you believe that you are getting bankruptcy discharges for people who would not otherwise get bankruptcy discharges were it not for your services?

A. BY MR. O'STEEN: Yes, in some cases.

(56) Q. Are you handling any personal injury matters for persons who would otherwise not be bringing personal injury claims were it not for your services?

A. BY MR. O'STEEN: Very few.

Q. Are there any?

A. BY MR. O'STEEN: Personal injury claims?

Q. Yes. That would not otherwise be litigated.

A. BY MR. O'STEEN: Yes, we have taken clients who have personal injury matters who have been turned away by three or four lawyers before they reached us, because the matter didn't seem to be profitable.

Q. Have you ever taken any personal injury matters which have not been turned away by anybody before it came to you?

A. BY MR. O'STEEN: Yes.

Q. In connection with your personal injury practice, you have noted that in your ad that information regarding other types of cases would be furnished on request.

Would you furnish them information about your personal injury services if the request were made?

A. BY MR. O'STEEN: Yes.

Q. Do you distribute cards for your

firm to people in hospitals who have had the misfortune to be in a personal injury?

A. BY MR. O'STEEN: Do you mean do we walk through (57) hospitals and knocking on stranger's doors?

Q. Precisely.

A. BY MR. O'STEEN: Absolutely not.

Q. Do you go to accidents, and at the scene of accidents give cards to the people who have had the misfortune of being in the accident?

A. BY MR. O'STEEN: No.

Q. Do you believe that you have the same First Amendment right, if you wish to do so, to go through the hospital or to give your card at the scene of accidents as you do to publish the ad which is Exhibit 6?

A. BY MR. O'STEEN: My answer to the question has to be that I really haven't formulated my own ideas about that type



of solicitation, that problem. I think that it may well be true that if tested that a lawyer had a constitutional right to engage in such solicitation.

I can tell you my personal feelings about it.

Q. I won't bring you into that. Mr. Canby can if he wishes. I simply want to understand what your opinion is about the proper function of solicitation of a legal clinic. It is my understanding that fundamentally it is the position of your office that you are free, under the anti-trust laws and under the First Amendment to publish Exhibit No. 6; is that correct?

A. BY MR. O'STEEN: Yes.

(58) Q. I wish to know whether it is also your view that you would be privileged to distribute cards in hospitals or go door to door, or to take fliers. I haven't asked you about that. Would you be free to have fliers distributed door

to door, announcing your service?

THE CHAIRMAN: Are you talking about handbills?

MR. FRANK: Handbills.

Q. BY MR. FRANK: Are you free to do that?

A. BY MR. O'STEEN: I'm sorry, I take no position to that.

THE CHAIRMAN: The witness has answered the question, Mr. Frank. Go to something else.

Q. BY MR. FRANK: You don't know.

Let me turn to Mr. Bates. Let me find out if you have a view on this subject.

Is it your understanding that you have a privilege under the antitrust laws and under the First Amendment, or either of them, regardless of the rules, to publish the ad which is Exhibit 6?

A. BY MR. BATES: Yes.

Q. Do you have an opinion as to

whether you are also privileged to distribute leaflets door to door, offering your services?

A. BY MR. BATES: I think I would answer it in the same fashion that my partner has on that. In other words, (59) I don't have an opinion which I feel confident in expressing at this moment.

Q. The same would be true of cards in hospitals or calling on the accident victims at the scene; is that correct?

A. BY MR. BATES: Yes.

Q. Mr. O'Steen, I notice that one of the services you offer is "Divorce or legal separation--uncontested (both spouses sign papers)".

My question is, what is an uncontested divorce?

A. BY MR. O'STEEN: A divorce in which both parties have fully settled the terms of their divorce, and -- well, I think that completes my answer.

Q. Well, let's take this up for a minute. When someone comes to your office and says, "I want a divorce", how do you find out from that person whether it is uncontested or not?

A. BY MR. O'STEEN: Well, typically, the inquiry is first made over the telephone, and one of our legal assistants handles those incoming calls, in order to determine whether the divorce is contested or uncontested.

Q. Explain that with some precision, would you please?

A. BY MR. O'STEEN: Yes. In inquiries made by the legal assistant, whether or not the terms have been (60) discussed with the adverse spouse, and whether or not complete agreement has been achieved on the important matters. If the person --

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THE CHAIRMAN: Mr. Bates, I'd like to

to clarify something. You referred to Mr. O'Steen as your partner. Is it, in fact, a partnership or a professional corporation?

WITNESS BATES: It's a partnership.

Q. BY MR. FRANK: The question which is before you, Mr. O'Steen, was: Just what is it that the person on the phone says to inquiring party about coming in, and so on?

A. BY MR. O'STEEN: Just a brief inquiry is made to determine whether or not the spouses have discussed the important terms of their divorce, and come to an (61) agreement on those terms.

If the caller answers in the affirmative, then an appointment is made, at which time the client sees an attorney.

Q. Let us suppose that -- we will make the caller she -- let us suppose she says, "No." Then, what does your telephone clerk say?

A. BY MR. O'STEEN: "No, we have not

come to an agreement on the terms of the divorce"?

Q. That's right.

A. BY MR. O'STEEN: They are referred to the Maricopa County Lawyer Referral Service.

Q. In short, you do not accept any contested divorces; is that right?

A. BY MR. O'STEEN: Not any longer. We did at one time. We don't do it now.

Q. What happens when the parties -- well, correction -- then, who comes in to see you?

You say the next step is an appointment with the attorney. Who comes in?

A. BY MR. O'STEEN: The spouse who called us.

Q. And the other spouse does not come in?

A. BY MR. O'STEEN: Sometimes both spouses come in. We make it clear from the beginning that we will represent one



of them, generally the caller, and that we (62) sometimes ask a nonclient spouse to step outside of the office and wait in the reception room while we take the information down from the client spouse.

Q. But you sometimes do that. Do you always do that?

A. BY MR. O'STEEN: No.

Q. How do you decide when to do it and when not to?

A. BY MR. O'STEEN: I think it's just a gut feeling that I have after several years working with it. We always make it clear to them that we will be counsel for one spouse, and the other spouse will be the adverse party, and that if there are any doubts or hesitations at all on the terms of the divorce, then we encourage both of them to go out and seek independent counsel.

Q. Let me take, hypothetically, an instance in which you allow both of them to stay in the room, and let us suppose that

they have a modest bit of property. This happens sometimes, doesn't it?

I'll get specific in a second as to the types of property, but not all of them are penniless; are they?

A. BY MR. O'STEEN: No.

Q. So that let's suppose, hypothetically that they have a house in which they own a small equity; a thoroughly used car and a number of pieces of personal property and furniture in the house; a refrigerator; that kind of thing. Is that a fairly typical case?

(63) A. BY MR. O'STEEN: I would say that's typical.

Q. Does it ever happen that when they come in to see you they, in fact, thought that everything had been ironed out, but they are not used to thinking about these things, and, in fact, it wasn't ironed out, and they really hadn't thought about what to do with the car and what to do with the house

and who was to pay last year's taxes, and who was to pay the outstanding bills, and so on. Do these matters ever emerge in a conversation with the two people with you?

A. BY MR. O'STEEN: Yes.

Q. What happens in those circumstances?

A. BY MR. O'STEEN: We stop the interview; inform the parties that formerly we told them there were only two ways we could function, either, one, if they came to an agreement with us with all terms; we could incorporate them into the right pleadings and handle the case for them or we could represent the party, the client in the contested divorce, and the other would have to go elsewhere.

In the case where both of them are sitting in the office, that is impractical, and we simply tell them they will have to both seek independent counsel elsewhere, if they don't resolve the dispute.

Q. Do you help them resolve the dis-

pute?

(64) A. BY MR. O'STEEN: No.

Q. Do you discuss with them the fact of the car and the refrigerator are about a push away and maybe they could take, each, one of them; that kind of thing?

A. BY MR. O'STEEN: I don't think I have ever done that.

I do give certain types of information at times. Typically, one of the things that people do not consider when they think about the divorce is the question whether or not the life insurance ought to be maintained on the life of the noncustodial parent in the event to support the parent if something happens to the parent on the child support. That commonly is something that is not considered by the people involved in the divorce. We discuss that when they come in.

The response is, "Well, gosh, we haven't thought about that."

I will explain to them the reason they

might want to consider such protection, and tell them it's up to them to decide whether or not they want it. But we are fully capable of obtaining an order of court and incorporate it in a decree or Decree of Dissolution to obtain such protection.

Q. But you never advise them as to how they should distribute the property?

(65) A. BY MR. O'STEEN: No.

Q. No matter how slight, if there is no contest; they haven't thought about it?

A. BY MR. O'STEEN: That's one of the things--it's very rare that a couple would come in to the office to seek assistance in the uncontested divorce, and they haven't decided how the property is going to be divided. In most cases they come into the office, and it's two feet long. They include the doilies on the sofa -- that much detail. So, that specific problem doesn't come up very often.

Q. What do you do with those lists?

A. BY MR. O'STEEN: The very long lists?

Q. Yes.

A. BY MR. O'STEEN: We do one of two things. If they feel strongly about it, we incorporate all that into the pleadings. I will inform them that if they have an informal agreement as to the division of such property, and it has already been exchanged, then there is no reason to recite all of that.

Q. How about the taxes, does it commonly happen that they haven't thought about accrued income taxes, such like insurance?

A. BY MR. O'STEEN: Are you talking about tax liability or tax refunds that they have?

(66) Q. Either way, that they haven't thought about; principally, the liability.

Let's suppose money has been earned by the community during the year, and they



simply have not focused on the fact that there are taxes due.

A. BY MR. O'STEEN: We inquire about that. Most of them have payroll deductions in excess of their tax liability, and most everyone we deal with has a refund coming, and so that is, of course, an item of property in which there is a combined interest, and most of the cases it is to be considered in dividing.

Q. Now, on this galaxy of variations that we have been speaking about, do these take a small amount of time?

A. BY MR. O'STEEN: No.

Q. What is the range that is the quickest or longest?

A. BY MR. O'STEEN: Are you talking about the attorney's time or combined staff time?

Q. The attorney's time. What is the shortest or the longest?

A. BY MR. O'STEEN: Including the dis-

solution hearing; including the total matter?

Q. Yes, we'll take the totality of the matter, short to long; what can it be?

A. BY MR. O'STEEN: I would say the short probably (67) requires about an hour and a half of attorney time, and the longest, perhaps three hours of attorney time.

Q. And the fee of \$175.00 applies (sic) to the shortest and the longest, and all in between; is that correct?

A. BY MR. O'STEEN: Yes.

Q. Without regard to the amount of property which is involved; isn't that correct?

A. BY MR. O'STEEN: That's right.

Q. Now, we have spoken earlier about the fact that you are likely to do wills for the people, or at least recommend them to them upon the conclusion of a divorce, when they become single persons again.

Do you recall that part of our discussion?

A. BY MR. O'STEEN: Yes, I recall that, saying that we don't do that often.

Q. But you do it from time to time?

A. BY MR. O'STEEN: Rarely. Occasionally.

Q. All right. If you do that, what do you charge for the wills?

A. BY MR. O'STEEN: \$30 for a simple will for one spouse; 15 for the spouse reciprocal.

Q. But I'm speaking now of a recently divorced person?

A. BY MR. O'STEEN: You are talking about an individual?

(68) Q. Individual.

A. BY MR. O'STEEN: \$30.

Q. I notice in the ad that you deal with changes of names. For the \$95, what do you do for them?

A. BY MR. O'STEEN: Have their name legally changed.

Do you want to know the steps?

Q. Just a word, how do you do that?

A. BY MR. O'STEEN: Well, the client comes in for an interview; the pleadings are prepared. That is, a Petition for Change of Name. It's then filed with the court. If notice seems to be required in a case, then notice is given in the manner prescribed by law. A hearing date is set by a legal assistant; a letter goes out to the client and informing them of the hearing date and asking that they meet us a few minutes early at the court house.

The lawyer then meets the client at the court house; conducts the hearing; takes --

Q. Mr. O'Steen, I'll ask you to assume for this hypothetical that the cases (sic) is one of a person in which no notice would be appropriate. It's a person in the community who is alone and simply wishes, for whatever reason, to make a change of his name, but there is no person to whom any notice would pro-

bably be sent. Could we assume such a case? That's not abnormal?

A. BY MR. O'STEEN: No. That's most of the cases; (69) have no notice requirement.

Q. Now, in that case, would you tell us with some precision, how that persons (sic) gets to you? Calls in for an appointment?

A. BY MR. O'STEEN: Yes.

Q. And gets one of the clerks?

A. BY MR. O'STEEN: Well, in this case, the receptionist -- if a person calls in and says, "I want to see an attorney about a change of name", the appointment is simply made by the receptionist at that time. The legal assistant isn't used in the appointment-making process and in the name change cases.

Q. The receptionist makes an appointment, and this person comes in to see you, hypothetically?

A. BY MR. O'STEEN: Yes.

Q. Would you tell us, please, what do

you say and what does this person say in the interview? Give us an outline of it.

A. BY MR. O'STEEN: I have an information sheet, which I don't have in front of me, which has been carefully devised to see that we get all of the information we have to have in order to prepare the pleadings and conduct the hearing. I take the necessary information down on the information sheet; discuss the fee arrangements of it with the client; inform the client (70) that a pleadings (sic) will be ready for signature on a day generally two or three days thereafter, then we make an appointment for the client to come back and sign the pleadings.

Q. That is the totality of your conversation with the client at that time?

A. BY MR. O'STEEN: Well, yes. I gave you a very abbreviated indication of what happens.

Q. Well, I am winding up my examination now, and we'll tax the patience of the panel.



Just tell me everything that happens on that conference. I want to know about it.

A. BY MR. O'STEEN: The person says, "I want a name change.

I will ask them, "Why? What's the basis of your desire to have the name change?

Frequently, what has happened is a child may have been raised by a step-father and has now reached adulthood; over the past has used the surname of the step-father on many records and with many associates, and therefore, some confusion exists over the use of two surnames on various records, and that, of course, is a sound and justifiable basis for legal change in name.

So, I note the reason for the request in change in name on the form. I take down all the additional data. (71) I cannot remember all the data that's required in one of those cases. It's on the information sheet.

The other things are substantially as

I related them before. We discussed fee arrangements. Our usual requirement is that we require one-half of the fee prior to preparation of the pleadings, and the balance prior to the filing. That's discussed. If other arrangements have to be made, we discuss it; come to an agreement, and notation on the fee arrangement is made on the information sheet.

The client is then escorted out to the receptionist; an appointment is made for the client to return and sign papers.

Q. Mr. O'Steen, do you ever take up with a client whether he needs a lawyer at all for this purpose?

A. BY MR. O'STEEN: For a change of name?

Q. Yes.

A. BY MR. O'STEEN: No. Wait, excuse me, Mr. Frank. I'll have to change that answer. Yes, I do on occasion, because when I find that the name change is one which does

not require the involvement of the Superior Court and can be handled through the Department of Vital Statistics, through the correction of a record, something of that sort, I frequently will send the client on his way with how to deal with the Department of Vital Statistics.

(72) Q. But isn't it true that nothing in our law requires the person to have an attorney to get the name change?

In the Superior Court, I'm told by the clerk that something like three out of 10 of the name changes are handled pro se or pro per, rather. Are you acquainted with the fact that name changes can commonly be obtained by individuals without the intervention of counsel?

A. BY MR. O'STEEN: I'm aware of the fact that it's done. I don't know how competently it's handled, and furthermore, it's not my job to inform a prospective client that he needn't employ a lawyer to handle

his work. Furthermore, there are no readily available forms or instructions for people who wish to do that kind of work themselves.

MR. FRANK: May I consult my co-counsel?

THE CHAIRMAN: Yes, sir, you may.

(Discussion off the record between Mr. Frank and Mr. Lewis.)

MR. FRANK: I have no further questions of these two witnesses.

MR. CANBY: You have other witnesses to put on?

MR. FRANK: I have one, Mr. Arnold. I can put him on or you can call them, as you wish.

MR. CANBY: I have a few questions that I'd like to (73) ask now, then perhaps I can recall them as part of my case.

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#### EXAMINATION

BY MR. CANBY:

Q. Mr. O'Steen, what do you do if some

body comes to your office with a malpractice case, medical malpractice, blotched spinal operation?

A. BY MR. O'STEEN: We don't take them.

Q. Where do you send them?

A. BY MR. O'STEEN: Lawyers Referral Service of the County Bar Association.

Q. You mentioned another attorney had been in your office. Did that attorney depart before this advertisement that's the subject of this proceeding was placed?

A. BY MR. O'STEEN: Yes.

Q. And you had no other attorney working with you at that time, did you?

A. BY MR. O'STEEN: No.

Q. You said that each attorney specializes in your clinic. Are you speaking of the different specialties between you and Mr. Bates?

A. BY MR. O'STEEN: Yes.

Q. Are you also speaking of the fact that you confine your practice, as a partner-

ship?

(74) A. BY MR. O'STEEN: That, also, yes.

Q. You refer to the printed forms that you use. Are those purchased from a stationery store?

A. BY MR. O'STEEN: We purchase some printed forms from the commercial outlets that market them, but we found very early in the going that most of them were not very well done; very unprofessional, and for that reason we have devised a good many printed forms of our own, and we use them regularly in our practice.

Q. Did you ever keep track of how much time you put into creating your own forms, your own systems and things like that?

A. BY MR. O'STEEN: We haven't kept track of it, but it will never pay. It's incredible hours of time in devising these systems.

Q. To your knowledge, does the Legal



Aid Society now take all divorce cases requested by clients who meet their income restrictions, their income qualifications?

A. BY MR. O'STEEN: No. I understand they have narrowed their guidelines a great deal, in terms of categorical limitations on the types of cases they take. I don't fully understand what those are.

Q. I don't think you had time to explain what your personal reaction was to giving out cards in hospitals or at the scene of accidents to people who had been hit.

(75) What are your personal reactions to that?

A. BY MR. O'STEEN: Well, my personal feeling about that is I don't like it. That sort of thing is undignified and unprofessional and does not serve the public interest, in my opinion. Therefore, I'm not in favor of it, but I hasten to add that that's not a position on the law, it's simply a personal reaction to that type of practice.

Q. Does part of your reaction have anything to do with the fact that the victim at the accident is likely to be in some sort of emotional reaction or physical disarray?

A. BY MR. O'STEEN: That certainly adds good reason for forbidding that type of practice.

Q. Before you placed that advertisement, did you spend any time in discussion or study between the two of you regarding your right to place that ad under the First Amendment or the antitrust laws?

A. BY MR. O'STEEN: Yes, we did, considerable time.

Q. Did you devote any discussion to the question of handbilling?

A. BY MR. O'STEEN: Leafleting of the type that Mr. Frank suggested?

Q. Yes, going door to door with leaflets.

A. BY MR. O'STEEN: No, we didn't discuss that.

(76) Q. You said that you always ask about life insurance in divorce proceedings, about the possibility of life insurance?

A. BY MR. O'STEEN: Yes.

Q. Is that required by any of your checklists?

A. BY MR. O'STEEN: Sure. We incorporated that on the standard divorce questionnaire, the information sheet, so that when an attorney obtains the information necessary to process a divorce, one of the questions which must be asked is: Do you have an agreement on that question, that issue?

Q. Divorces or dissolutions can be handled pro per, can't they?

A. BY MR. O'STEEN: They can, and many of them are.

Q. Do you have any idea how many are, percentage?

A. BY MR. O'STEEN: I could tell you what Commissioner Tom Novak has told me, if there is no objection.

THE COMMISSIONER: That's quite all right.

A. BY MR. O'STEEN: (Continuing) Something over 50 percent of the divorce filings in Maricopa County are pro per.

Q. BY MR. CANBY: Contested and uncontested?

A. BY MR. O'STEEN: That's my understanding, 50 percent of the total divorce filings.

(77) MR. CANBY: That's all of the questions I have that related to the subject of Mr. Frank's examination. There are a few unrelated subjects I'd like to reserve the right to take up with these witnesses.

MR. FRANK: So stipulated.

THE CHAIRMAN: Mr. Frank, any recross?

MR. FRANK: No.

THE CHAIRMAN: I have a question or two, if you don't mind, gentlemen?

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EXAMINATION

BY THE CHAIRMAN:

Q. First, do you, Mr. O'Steen, negotiate fees with clients if someone comes in and says, "A hundred and a quarter is too much for contested, will you take \$85?"

A. BY MR. O'STEEN: We don't often negotiate fees. On occasion, under special circumstances in an individual case, we might make a decision to reduce a fee or charge a fee slightly lower than our typical fee for that type of case. As a general rule, we don't negotiate on fees.

Q. Basically, you have what might be called a catalog price for service?

A. BY MR. O'STEEN: You might call it that.

Q. Would your answer be the same, Mr. Bates?

A. BY MR. BATES: Yes, it would.

(78) Q. The second one that I'd like to ask, and it might be difficult to answer, but I think is perhaps at the heart of

the whole inquiry: Mr. O'Steen, can you tell us, if you can articulate it, the motive or motives that you had for placing the advertisement, in any order of priority that you think is appropriate?

A. BY MR. O'STEEN: Well, the obvious one is to attract clients.

Q. And that is for the purpose of maximizing your income; is that true?

A. BY MR. O'STEEN: No, I think that's probably an unfair statement.

Q. I don't wish to suggest that there is anything immoral about maximizing your income, and it was not intended to be a biased question, or that it would be given anything other than the neutral consideration, and therefore, I do not regard it as unfair. My question, basically, is whether one of the motives that your clinic had in placing the advertisement was to maximize your income opportunity?

A. BY MR. O'STEEN: I'm bothered a



little by the term "maximize income opportunity". It was really a question of survival of this clinic and this type of operation. Had I been primarily motivated by maximizing my income, I would have applied for a job with your firm (79) or Mr. Frank's firm, although I probably would not have been offered a job. I would have done something like that.

I don't mind confessing to you that this has not been a terribly profitable operation up to this point, but we think it can be made profitable, profitable that attorneys can earn reasonable incomes doing this type of work, and if that doesn't happen this clinic concept will not survive. We have to be committed to the idea that lawyers can make reasonable incomes from that type of work, but basically, it was a question of income at that point.

Q. What you are saying, the systems approach, as you have described, is not economi-

cally viable unless it can rely upon substantial volume; is that true?

A. BY MR. O'STEEN: Precisely.

Q. Now, among your motives, would you say that at least in part you were moved by a desire to have a better system of delivery of legal services to persons who were in need of legal services, who otherwise might not avail themselves of legal services:

A. BY MR. O'STEEN: If I understand the question, you are asking me if that was one of our motives in doing this.

Q. In placing the advertisement.

A. BY MR. O'STEEN: Yes, it was.

Q. It was.

Do you think that you could accomplish the same (80) objective without quoting prices for services in the advertisement?

A. BY MR. O'STEEN: No, because I think price information is absolutely essential to an intelligent decision by a person on the selection of a lawyer.

Q. Is it your judgment that it would generate healthy and constructive competition to the benefit of the consuming public if multiple competitive advertisements were placed in the media; each one attempting to offer a comparable service at a lower price?

A. BY MR. O'STEEN: Yes.

Q. And you would not think that that kind of competitive advertising might motivate the individual clinic or practitioner to cut the quality of service in order to be able to reduce the price?

A. BY MR. O'STEEN: Well, I should hope not. That has not happened in our practice, and at the risk of sounding boastful, I think, if anything, the careful development of the systems approach that we have has caused the quality of the work done in our office to be second to none anywhere in the state.

I think if lawyers began to cut the quality of their service, that's another problem, and the Bar Associations are perfectly free to do,

and capable of dealing with that problem. That sort of thing happens (81) today. All lawyers are not equally competent, and the Bar Association will have to learn to grapple with that, I think, but, to me, is absolutely clear that high-quality service can be done and can be rendered at a rate below the prevailing rates if price advertising is permitted.

THE CHAIRMAN: Does anyone have any further questions?

MR. FRANK: One.

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#### EXAMINATION

BY MR. FRANK:

Q. One thing, Mr. O'Steen, that I should have taken up earlier; I think it should be on the record. I think it's fair to say that in putting in this ad, you and your partner have not proceeded defiantly or either contemptuously by the action on your part towards the Bar or the Supreme Court, and by stipulation of your clients it has been agreed that you

would not advertise further pending reasonably rapid disposition of this matter; essentially what you have done is create a test case to determine whether you can do this or not? Isn't that about right?

A. BY MR. O'STEEN: That's right. We don't want to be accused of causing frivolous litigation, and that's not (82) what we are doing.

We did think that what we did was essential to the survival of this concept, but it is true that it in no way was done with any disrespect or contempt for the State Bar or the Supreme Court. We are delighted the issue being so well aired.

MR. FRANK: I will now come back to this when you consider this, or if you should at some later time, when the Supreme Court, the problem of penalties. So I do know this has been a one shot, and it has been agreed that there will not be further advertising pending a reasonably speedy disposition of

the matter.

Mr. Canby, is that right?

MR. CANBY: Yes, that's our intention.

I don't recall stipulating.

THE CHAIRMAN: It is clearly understood, however, that the Respondents acknowledge and admit, for the purpose of this proceeding, that the placing of the advertisement constituted a violation of a rule of professional conduct promulgated by the Supreme Court of this state. Is that not true?

MR. CANBY: That's not only true, and is admitted in our Answer, with the reservation that we attack the validity of the rule. What you say is true.

(83) THE CHAIRMAN: Do you agree with that, Mr. O'Steen?

WITNESS O'STEEN: Yes, sir.

THE CHAIRMAN: Mr. Bates?

WITNESS BATES: Yes, sir.

MR. FRANK: Nothing further.

\* \* \* \*



## EXAMINATION

BY MR. CANBY:

Q. One question: The Chairman asked you, Mr. O'Steen, one question, something like that: You advertised, then, because your clinic was not economically viable without it?

A. BY MR. O'STEEN: I think that was my response.

THE CHAIRMAN: The question was "not economically viable without a substantial volume of business to treat with the systems concept."

Q. BY MR. CANBY: I would add, at those prices, or at low prices; is that correct?

A. BY MR. O'STEEN: That's correct. I was reading that into the question.

Q. I was trying to see what was incorporated in your answer. Yes.

A. BY MR. O'STEEN: Yes. The fees we charge cause us to know that perhaps --

perhaps I should start over and try to rephrase this.

(84) Yes, it is true that it was not economically viable for the clinic to operate at the fees charged for various services without communication of price information in the form we chose to do it.

Q. To increase volume?

A. BY MR. O'STEEN: In order to increase volume.

MR. CANBY: I have no further questions.

\* \* \* \*

## EXAMINATION

BY THE CHAIRMAN:

Q. Have you ever made an estimate as to the number of pieces of business that you have to do in a day, week or month in order to be able to break even?

A. BY MR. O'STEEN: We know what dollar volume we have to gross in order to break even.

Q. Do you know what your gross dollar

volume is that is necessary to break even?  
Can you state it?

A. BY MR. O'STEEN: I think Mr. Bates has that.

Q. Mr. Bates, can you answer that question?

A. BY MR. BATES: The last time we looked into it was several months ago, and there have been several changes in the firm in the use of personnel and in the use of automatic typewriting equipment.

Do you want a figure? Is that what you are asking?

(85) Q. I am interested in a figure, yes.

A. BY MR. BATES: I would estimate between \$250 and \$300 a day.

Q. Between \$250 and \$300 a day gross fees received?

A. BY MR. BATES: Yes.

Q. Do you maintain any time records for your time?

A. BY MR. BATES: In cases where we normally keep time records, yes.

Q. But there are certain cases in which you do not keep time records?

A. BY MR. BATES: We did initially, to find out how much time was being typically invested in standard cases, and we took an average but we do not keep time records of every case that we handle.

Q. Do your paralegals keep time records?

A. BY MR. BATES: In our hourly rate cases, yes.

Q. Do you have hourly rate cases?

A. BY MR. BATES: Yes.

Q. Do you have some matters that you do not charge for a flat fee?

A. BY MR. BATES: Yes, that's correct.

Q. Would you be willing to tell the Committee what your hourly rates are?

A. BY MR. BATES: Yes. It's \$40 an hour.

Q. For the lawyers?

(86) A. BY MR. BATES: For the lawyers.

Q. Do you charge on an hourly basis for your legal assistants?

A. BY MR. BATES: That's \$20.

Q. Is the \$40 rate the same for both you and Mr. O'Steen?

A. BY MR. BATES: Yes.

THE CHAIRMAN: That's all I have.

MR. FRANK: Nothing further.

MR. CANBY: Nothing further. I only have a short few questions left, but I don't think they'd logically come now.

(Discussion off the record.)

(Recess taken.)

\* \* \* \*

JAMES L. JONES, being sworn as a witness by the Chairman, was examined and testifies as follows:

MR. CANBY: This is a defense witness being called out of turn.

EXAMINATION

BY MR. CANBY:

Q. Mr. Jones, would you please state your

full (87) name and address?

A. My name is James L. Jones. I live at 6821 North 8th Avenue, Phoenix.

Q. You have some connection, haven't you, with the American Association of Retired Persons?

A. I do.

Q. What is that position?

A. I am associated with the Phoenix Chapter No. 41, and act on the Board of Directors, and as a Legislative Chairman of this Committee.

Q. How many members has your Chapter?

A. The Chapter 41 has about 700 members.

Q. I see. Statewide, there are how many in the Association?

A. Statewide, there are approximately 118,000 members of AARP at the present time.

Q. In your capacity as a director and legislative liaison and as any other capacity you have, do you have considerable contact with the membership of your organization?



A. I do.

Q. Are they all retired persons?

A. No, they are not all retired persons.

The membership is open to those fifty-five years of age and older.

(88) Q. Do you have any general estimate of what percentage? Is the majority of them retired?

A. Oh, yes. I'd say at least 80 percent are retired.

Q. In your contact with these members, do you have any general knowledge of the economic condition of the members, generally or of specific members?

A. I would say, generally, they are in the lower economic spector of our population.

Q. Do the retired members of your organization tend to be on fixed incomes?

A. Yes, they do.

Q. Are you aware whether or not the members of your organization, with whom you are acquainted, have need or have had occasion to

need legal services?

A. Yes, they do. They do have need of legal services.

Q. How do they find that out?

A. Well, we have a Consumer Affairs Committee, and we make studies of this sort of thing; consultation with various members, and offer services, such as income tax preparation services and so forth to our membership.

Q. Have you ever had occasion to advise members of your organization who had questions about obtaining legal services?

A. Yes, I have.

(89) Q. What is the nature of that advice?

MR. FRANK: Could I have foundation? What kind of legal services are we talking about?

MR. CANBY: Let's ask that.

Q. BY MR. CANBY: What kind of legal services?

A. I think the legal services are the same as any group of citizens, they would have. I don't think they are peculiar at all, that this is a group mainly of retired persons.

Most of us, or many of us are still active in businesses and in social affairs, so I don't think the legal services would be any different than you'd find in the cross section of the public at large.

Q. Have you discussed the obtaining of legal service with people, for instance, who wanted to get a divorce, or a will?

A. A will, yes. Divorce, no.

Q. Possibly probate proceedings; someone had died?

A. We took a very active interest in the probate bill that was before the legislature in the session a couple of years ago.

Q. What advice do you give your members if they ask you how to obtain legal services?

A. Well, we don't recommend any individual attorney or send them to any firm of attorneys,

but we do suggest (90) when they do contact an attorney that they seek to the best of their ability to get an estimate of charges and be sure that they understand what the expense is going to involve.

Q. Showing you Bar Exhibit No. 6, this is an advertisement that appeared in the "Arizona Republic". In your opinion, would that advertisement be of assistance to your members in obtaining legal services?

MR. FRANK: Objection.

May I ask a question on voir dire?

THE CHAIRMAN: Yes, you may.

#### VOIR DIRE EXAMINATION

BY MR. FRANK:

Q. Mr. Jones -- it's Jones, is it?

A. Correct.

Q. Mr. Jones, you have testified a moment ago that you have not had occasion to counsel with your members concerning divorces and legal services. Is that what you just told us?

A. I said that I personally have never been called upon to discuss that type.

Q. Right. Secondly, have you ever been called upon to discuss bankruptcy with the members of your organization, individually?

(91) A. I have not.

Q. Have you ever been called upon by any of them to advise them concerning changes of their names?

A. No, I have not.

MR. FRANK: I will not object, Mr. Chairman, because we have agreed we will make no objections, but I want the voir dire to stand as going to the weight of this evidence.

THE CHAIRMAN: Yes, it may.

I'd like to have the question reread to Mr. Jones, and I'd like to have him think about it and give an answer.

(Question read by reporter.)

A. I think it would be.

EXAMINATION (CONTINUED)

BY MR. CANBY:

Q. Why?

A. For the simple reason that it places some basis of legal cost on the specially mentioned matters, and it also has a statement here, "Information regarding other types of cases..." would be "...furnished on request", and I think the big difficulty in the minds of most people seeking legal services is what is the basis of cost, and if you can find a clear cut statement in this, it seems (92) to me it would be helpful.

MR. CANBY: I have no further questions.

\* \* \* \*

EXAMINATION

BY MR. FRANK:

Q. Mr. Jones, who was the last member of your association who consulted you on a need for legal services?

A. Are you expecting me to give you a name?

THE CHAIRMAN: The question calls for a



name. You may say that you don't know, if you don't know.

A. (Continuing) I'm not sure that I could recall the name of the individual.

Q. BY MR. FRANK: When did that happen?

A. I'd say about two weeks ago.

Q. What was the last one prior to that?

A. Oh, maybe a week before that.

Q. What was the nature of those services in those two instances?

A. These were problems involving traffic cases and income tax matters.

Q. Are most of the inquiries that come to you things which would involve either petty criminal offenses, such as traffic or income tax? Is that the weight of them?

A. No, I don't think that would be the case.

(93) Q. Would you give us a description of what the others are?

A. Well, I would have to take some

time to prepare a list like that.

As I said, I think the range would be the same range of legal problems that confront any of society.

Q. But you have nothing specific at this minute?

A. I didn't come prepared to recite a list of items of that character.

MR. ROBINETTE: Could I have one question?

THE CHAIRMAN: Of course, Mr. Robinette.

Mr. Robinette is one of the members of the Committee who is hearing the testimony.

#### EXAMINATION

BY MR. ROBINETTE:

Q. Mr. Jones, you said you advised your friends and association, very properly so, that if they see a lawyer they should make inquiry as to what the nature of the fees would be and what it's going to cost them. I believe that's your testimony?

A. That's right.

Q. Have any of them ever told you that

when they consulted the lawyer, the lawyer refused to discuss fees with them?

(94) A. No, they had not said that to be the case, but it has been my experience that some of these same people have been unhappy with the results of being told that the cost would be one thing, and finding out that they were substantially more than they had been told they would be.

Q. Of course, you don't know of your own knowledge whether these prices listed in the Exhibit that's been displayed to you are higher or lower than the going rates?

A. I do not.

Q. Among lawyers, generally?

A. I do not.

MR. ROBINETTE: That's all.

#### EXAMINATION

BY THE CHAIRMAN:

Q. Could I inquire, Mr. Jones, are you aware of a service which is implemented by the Maricopa County Bar Association called

the Lawyer Referral Service?

A. I am. We have availed ourselves of an expert from your Lawyers Referral group that appeared on a program before our monthly meeting about two years ago.

Q. When members of your association inquire of you from time to time concerning how they would go about getting the services of an attorney, do you recommend (95) that they get in touch with the Maricopa County Lawyers Referral Service?

A. We do not?

Q. Can you tell us why you do not?

A. The experience that we have had with that has not been very good.

Q. In respect to the quality of legal services or what?

A. I think the results that I have known about have indicated a rather lack of substantial interest on the part of the attorney or attorneys to whom they were sent to; and after all, for a \$10 fee you couldn't

expect to get too much, probably.

Q. This kind of an experience has been reported back to you from people who have gone to the Lawyers Referral Service?

A. Right.

THE CHAIRMAN: All right. Thank you.

MR. FRANK: No questions.

MR. CANBY: No questions. Thank you very much, Mr. Jones.

THE WITNESS: Thank you very much.

THE CHAIRMAN: Mr. Jones, we appreciate very much your taking your time to be of help to us, and you may be excused.

(96) THE WITNESS: Thank you.

(Witness excused.)

MR. FRANK: Mr. Chairman, I present Mr. Arnold. Could he be sworn, please.

\* \* \* \*

RICHARD M. ARNOLD being sworn as a witness by the Chairman, was examined and testifies as follows:

#### EXAMINATION

BY MR. FRANK

Q. Would you state your name for the record?

A. Richard M. Arnold.

Q. Mr. Arnold, you are a member of a firm of architects. Have you given the name of that firm to the reporter during the recess?

A. No.

THE CHAIRMAN: Would you like to do it now?

MR. FRANK: I'm going to hand it to her, because of the spelling.

THE WITNESS: It's Guiry, Srnka, Arnold & Sprinkle.

Q. BY MR. FRANK: Mr. Arnold, how long have you been an architect?

A. Since 1956.

Q. Is there a national association of architects?

(97) A. The American Institute of Architects.



Q. Are you a member of that?

A. I am.

Q. Is there a state association of architects?

A. Yes.

Q. What is that?

A. Arizona Society of Architects.

Q. In addition to that state society, are there local Chapters?

A. There is a Central Arizona Chapter and a Southern Arizona Chapter.

Q. Mr. Arnold, the national organization has, I believe, a post of high professional honor for some limited number of architects known as Fellows. Do I have the word correct?

A. Correct.

Q. Are you a Fellow of the American Institute of Architects?

A. Yes, I am.

Q. How many of those are there in the State of Arizona?

A. I believe there are 15.

Q. What is the general qualification of a Fellow? How does one become a Fellow?

A. Through service to the profession and to the (98) community.

Q. In?

A. Advancing architecture.

Q. Of service to the profession, have you held any offices in more than the Arizona Chapter?

A. All of them.

Q. Have you held any offices in the state association?

A. I was president several years ago.

Q. Mr. Arnold, in the course of your work--

MR. FRANK: May we stipulate that Mr. Arnold is a fully-informed expert on advertising and its practice in the state, or do you want more foundation?

MR. CANBY: No, I waive the foundation.

Q. BY MR. FRANK: Mr. Arnold, what is the practice of the architectural profession in respect to newspaper advertising?

A. It has been prohibited.

Q. For how long?

A. I think since the founding of the Institute which was, I believe, in the late 1880's.

MR. FRANK: Mr. Chairman, Mr. Canby, I ask leave to lead, because this is obvious stuff.

Q. BY MR. FRANK: Isn't it true, Mr. Arnold, that in connection with your profession, unlike law or (99) accounting, the discipline is left to your association and is not enforced by the state in any way; is that correct?

A. That is correct.

Q. So far as advertising is concerned?

A. Right.

Q. But if, in fact, an architect were responsible for advertising, are there disciplinary procedures within the architectural organizations to examine in to such matters?

A. Yes. There are committees on ethics in each Chapter, as well as at the national level.

Q. What sanction would be imposed, if it should appear that someone were guilty of either advertising or repeatedly advertising, perhaps?

A. If it went as far as the national level, it would probably be a censure, which would be published in the Institute's material.

Q. Suppose it happened again, what discipline would be imposed?

Can somebody be dropped from the association?

A. Conceivably, they could be dropped from the membership.

Q. In your profession, however, unlike the others, I think you permit person-to-person solicitation; don't you?

(100) A. Yes.

Q. Would you describe the kind of solici-

tation that architects do regard as proper?

A. Well, traditionally, they hoped they would get known by their works, and people would come to them or clients would come to them. As it happens, we will make person-to-person contact with potential clients, and making it known what services we offer.

Q. And by the traditions of your profession, it's perfectly proper to call on someone -- correction -- call on someone whom you believe to be about to do some building, to interest him in engaging your firm for that purpose, is that right?

A. That is correct.

Q. But you bar advertising to the general public, as a whole?

A. Right.

Q. As distinguished from person-to-person?

A. Right.

Q. Now, what is the record in this

community for young architects?

Do competent architects find that they can develop careers, normally, within a few years here?

A. It would seem so, with the number of architects that we have in the community.

(101) Q. Well, you know the profession thoroughly, as president and having moved through all of the chairs all over the state; isn't that true?

A. Yes.

Q. Is it true that quite universally competent architects, at least from two to five years up, are able to find a reasonable amount of work to keep busy and make reasonable incomes?

A. Yes.

Q. And they do that without any public advertising?

A. That's correct.

Q. Well, Mr. Arnold, what are the evils of advertising, as the architectural



profession sees it?

How would the public interest be disserved?

A. It's considered to be self-laudatory as through the Code of Ethics.

Q. But I want to get to the reason for the rule. What is the loss to the community, if any?

A. I think by the possibility of misleading the public, in general.

Q. What do you regard is the capacity of architectural advertising to mislead?

A. They could very readily oversimplify the concept of problems that the owner would face in going about a building project.

(102) Q. Can we be concrete about this? Isn't it perfectly true that, for example, you have done, I think, as I recall it, I think it's the library in Flagstaff--is my memory correct--some building in Flagstaff--that won a prize? Straighten

me out, because I'm speaking from memory.

A. We have done various buildings on the campus in Flagstaff.

Q. There was one --

A. There was a NASA project at the Lowell Observatory.

Q. If you simply put a picture of that building in the newspaper and put below it as an advertisement Richard Arnold as the architect of this building, would that mislead anybody?

A. Just the picture itself?

Q. Just the picture and your name.

A. I don't see that it would.

Q. What, then, would be the kind of advertising which you think might mislead?

Will price advertising mislead?

A. Suppose it said that "Richard Arnold designed this building on budget for this client", that's implying that I would always do that.

Q. Do you miss occasionally?

(103) A. I'm afraid so.

Q. Mr. Arnold, I want to get to the question of price advertising. Do you regard price advertising of architectural services as somehow inherently misleading?

A. Well, yes.

Q. Why?

A. Because the pricing of services will vary all over the place as to the nature of services and the scope of the project, the scope of the problems that the owner is encountering.

Q. Mr. Arnold, isn't it true that frequently architects utilize a percentage of the cost of the building as a base portion of the fee?

A. That is one of the measures, right.

Q. But is it not also true that there are in the standard agreements used by architects paragraph after paragraph, running to pages for varying items which may affect the price before the job is done?

A. Yes.

Q. And there are fixed price items within the percentage, and then there are a lot of other items which are additional items which can unexpectedly crop up; isn't that so?

A. That is right.

Q. And that is universal architectural practice (104) under forms of the contract that are substantially always used by architects; isn't that so?

A. Quite right.

Q. Do you regard it as misleading, then, to say, "We will build your home for six percent of the cost"?

A. I would say it was misleading, of course, besides being poor business.

Q. And misleading in the sense that if you use the standard contract, it simply won't be true, because of the miscellaneous unanticipatable items; isn't that right?

A. Yes.

MR. FRANK: Your witness.

\* \* \* \* \*

EXAMINATION

BY MR. CANBY:

Q. Is it misleading if you advertise that you will build a home for six percent of cost, and then you go ahead and do it? I mean, that you will do the architecture.

A. After the fact, it was not misleading beforehand, right.

Q. Right. In other words, it was performed according to the advertisement, then that would not be misleading; is that correct?

A. It wouldn't be misleading. It would probably be misleading in the first place, from a practical matter, (105) that you are guaranteeing a price to begin with, when you don't know what the circumstances are.

Q. Of course, it doesn't mislead if you adhere to that price?

A. True.

Q. It may be bad business, and you may find it economically unfeasible to adhere to that price?

A. If it was accomplished, and the owner was not mislead (sic).

Q. Mr. Frank asked you whether it would mislead the public to put a picture and the name of yourself, an architect, let's say, in the newspaper. Is that forbidden by the professional code of architects, now?

A. If it appears as advertising, yes.

Q. If you simply put in a box?

A. A paid advertising?

Q. Paid. Okay, you paid to have a picture put in and your name, that would be not permitted?

A. No, that's right.

Q. Are you allowed to put a sign up at the building site with your name as architect?



A. Yes.

Q. The several pages of variances that may occur in a building, is that a generally standard form used by architects?

(106) A. Yes, it is.

Q. Do all architects use the same percentage figure information in those instances when they will perform the architectural services for a percentage of the cost, along with those qualifications which are standard?

Do all architects charge the same percentage?

A. No, nor for the same type project, either.

Q. It would violate your code, would, it, to publish a statement saying, our base percentage for a particular type of job described is seven percent, subject to qualifications used in the standard architect form?

A. If it's plain advertising, it would

violate.

Q. It would violate.

You testified that competent architects are able to achieve a viable practice within somewhere two to five years. Do any incompetent architects manage also to achieve viable practice?

A. You are asking me to make a judgment?

Q. Yes, I do, because it seems to me the question you answered previously calls for a judgment of whether competent architects are able to succeed.

MR. FRANK: You won't have to name them, Dick.

Q. BY MR. CANBY: No, I won't ask you to name them.

A. The answer is, of course.

Q. Are there architects who fail to establish a (107) practice?

A. Yes.

Q. There are.

What are the consequences of being drop-

ped from membership in the association that you mentioned?

A. Simply that you are no longer a member or enjoy any of the privileges of membership, or that you can use the initials AIA in conjunction with your firm name or your own name.

Q. If an architect advertises through paid advertising in newspapers, is it possible that he will lose his license to practice, to practice architecture?

A. No, that's not covered by the statute.

MR. CANBY: I have no further questions.

MR. FRANK: Nothing further.

THE CHAIRMAN: I'd like to ask a couple questions of Mr. Arnold.

#### EXAMINATION

BY THE CHAIRMAN:

Q. Does the AIA permit its members to bid competitively for public jobs?

A. To my knowledge, there is no stipulation in the ethics with regard to that subject.

Q. Do I understand, then, if the Scottsdale School (108) District was contemplating building a new high school, that architects would be free to come in; be interviewed by the Board and quote a basis for their compensation in competition with other persons?

A. I take back my first comment. There is a prohibition as to competing on the basis of fee.

Q. So, if Architect A appeared before the Scottsdale Board and said, "I'll build your school for four percent for plans and two percent for supervision", and another fellow came in and said, "I can beat that, I'll do it for three and a half and two", that would be a violation of the standard of ethics in your profession?

A. That's right.

Q. We have been advised that the

Attorney General of Arizona issued an opinion in which he held that it was unlawful for the accounting profession to compete on that basis. Are you aware of whether or not the architecture society has been a subject of a comparable opinion?

A. No. I have not, of an opinion being issued.

MR. FRANK: May I make a notation for the record, Mr. Chairman?

THE CHAIRMAN: Yes. Do you have some knowledge about that?

MR. FRANK: I think so. The statute which deals with competitive bidding in the state does not apply to (109) architects, and does apply to a number of other professions. So that there is an expressed difference there.

Now, the opinion of the Attorney General deals with certain general anti-trust matters and bypasses the state statute in a burst of enthusiasm of his own.

Mr. Arnold, it is true that that matter has not been taken up, of the architects, by the Attorney General; whether because of statutory difference or otherwise, we don't know. Isn't that true?

THE CHAIRMAN: He has testified that he is not aware that there is any such opinion.

MR. FRANK: I thought you would like to know the state statute is different.

THE CHAIRMAN: I understand. I also said I understand that the opinion of the Attorney General did not rely upon the statutory difference; it was based upon the antitrust law.

Q. BY THE CHAIRMAN: You testified that the base charge made by architects, in general, are based on a percentage of the total amount of the contract?

A. That has been traditional.

Q. It's usually divided between a percentage per plans and percentage for



supervision; is it not?

A. Yes.

(110) Q. Has your association, either statewide or nationally, ever circulated or published recommended minimum percentages for various kinds of construction?

A. Yes, several years ago, but they have been withdrawn.

Q. You have discontinued doing that; isn't that true?

A. Right.

Q. At the present time individual architects are free to negotiate their percentages with individual clients?

A. Or any other basis of compensation.

Q. Or any other basis.

Do you feel that there is a need in the State of Arizona for wider delivery of architectural services to persons who are not now receiving needed services?

A. Yes.

Q. In general, is there much demand

for architectural services among the indigent?

A. No, not directly.

Q. For the most part, the needs for architectural services is a direct function of the availability of money or sources of money for persons to build things; isn't that right?

A. That's right.

(111) Q. Is there such a thing as a Legal Aid for Architectural Services for somebody who is desperately in need of an individual to provide him a design for improving what might be an unsafe or uninhabitable structure, but he can't afford to pay for the services?

A. Yes, the Chapter provides for that service.

Q. This case that we are considering involves an advertisement which places job fees on relatively standardized services, such as an uncontested divorce; what is

known, in quotes, "Simple will". Does your profession have that kind of standardized product, or is it pretty much custom, based on a structure-by-structure difference?

A. No, it would not be standardized, it would become very custom.

Q. So that even if you wanted to, I gather, it probably would be impractical for your profession to quote flat fees for architectural services, in connection with the design of a building, unless you were talking about a very standardized structure?

A. That's right.

THE CHAIRMAN: That's all I have.

MR. FRANK: Nothing further.

MR. CANBY: No questions.

MR. FRANK: May the witness be excused?

(112) MR. CANBY: No objection.

THE CHAIRMAN: Mr. Arnold, you may be excused, and thank you very much for helping.

(Witness excused.)

MR. FRANK: We rest.

THE CHAIRMAN: Would you like to call your next witness, Mr. Canby?

MR. FRANK: Do you want to put in your Exhibits, or did you do that before?

MR. CANBY: No.

THE CHAIRMAN: The only Exhibit we have for the Respondents is a No. 11. If you have others, would you like to have them marked now?

MR. CANBY: My witness has a couple of them. Let me mark this. This would be Respondents' Exhibit 12.

In Mr. Harrison's deposition, he refers to a brochure of the "Arizona Legal Services". This, I believe, is the brochure, the "Bylaws and Participating Attorney Rules" of "Arizona Legal Services".

MR. FRANK: No objection.

THE CHAIRMAN: It's called the "Bylaws"?

MR. CANBY: The title seems to be either "Arizona Legal Services" or "Answers About ALS", then there is a statement, "Bylaws and

Participating Attorney Rules".

THE CHAIRMAN: All right, there being no objection, (113) Respondents' Exhibit No. 12 may be received.

(Booklet marked Respondents' Exhibit No. 12 for identification by the Notary, and received in evidence.)

THE CHAIRMAN: Would you stand and raise your right hand, please.

\* \* \* \*

STEVEN RICHARD COX, being sworn as a witness by the Chairman, was examined and testifies as follows:

MR. CANBY: Well, before I begin the examination, I do have now the additional material, Respondents' Exhibit 13 will be a study entitled, "Restricted Advertising and Competition, The Case of Retail Drugs", and Respondents' Exhibit 14 will be a study from the "Journal of Law & Economics", titled, "The Effect of Advertising On The Price of Eyeglasses".

For No. 15, I think I'll introduce Mr. Cox' vita, the present witness' resume.

THE CHAIRMAN: Any objection to 13, 14 and 15?

MR. FRANK: None.

THE CHAIRMAN: Okay, they may be received.

(Booklet marked Respondents' Exhibit No. 13; copy of article from "Journal of Law & Economics" marked Respondents' Exhibit 14, and Vita of Steven R. Cox marked (114) Respondents' Exhibit 15 for identification by the Notary and received in evidence.)

\* \* \* \* \*

#### EXAMINATION

BY MR. CANBY:

Q. Mr. Cox, could we have your full name?

A. Yes. Steven Richard Cox.

Q. Your address?

A. 3324 South Terrace Road, Tempe, Arizona.

Q. What is your employment?



A. I'm Associate Professor of Economics at Arizona State University.

Q. We have your vita sheet. Let me just ask one or two questions. You are in economics. How long have you been teaching?

A. Since 1970, the fall of 1970.

Q. You received your Doctors at Michigan?

A. University of Michigan, in January, 1971.

Q. Do you have a specialized area within economics?

A. Yes. It's the field known as industrial organization and public policy. The study of American industry and the impact of antitrust laws on competition in industry.

Q. In your list of publications you have recently published, is my understanding, in the field of defective (115) advertising?

A. Yes. There are many interests, subfields or topics in the field of the

industry, competitive advertising.

My most recent interest has been the role of information in making the market more competitive, and the effect of advertising on the amount of information that consumers have. Basically, three out of the last four articles that I have written and had accepted for publication have dealt with that either theoretically or practically.

The practical use has been the study of household detergent industry and information in the household detergent industry.

MR. FRANK: Mr. Canby, may I ask a question?

I'm holding your vita. Which of the last three or four articles do you refer to?

THE WITNESS: They are under the "Articles Published" on page 2. They are 10, 11, 12, and 13. I don't remember which of the ones is not, of 10 to 13 is not dealing with advertising.

MR. FRANK: Thank you. That helps me.

MR. CANBY: I'm assuming that there is no further need to go into basic qualifications; is that correct?

(Discussion off the record.)

(116) THE CHAIRMAN: Mr. Canby, the Committee will take into consideration not only the testimony of Doctor Cox but also the resume, which is Exhibit No. 15, in reaching the conclusion that he is qualified to express opinions in the field of his expertise.

MR. CANBY: Thank you, Mr. Chairman.

Q. BY MR. CANBY: Mr. Cox, have you had any occasion recently to examine any studies relating to the effect, the economic effects on prohibitions on advertising?

A. Yes. In my research on advertising and its impact on marketplaces I have come across two major studies; the only two, really, that I know of, and they are the ones that you introduced in evidence as

Exhibits.

Q. Respondents' Exhibits 13 and 14, I think we are referring to.

A. 13 and 14.

Q. To back up for a minute, you said one of your areas of special interest was the effect of information on the competitive system. Would you elaborate a little on it?

A. Well, economists have a model known as perfect competition. This model is based on a number of assumptions. One of the assumptions of the model is that consumers have perfect information. Okay.

(117) So, whenever, of course, that assumption breaks down and consumers don't have perfect information, the conclusion of the model, namely, the perfect competition that exists breaks down.

Now, maybe without trying to be too pedantic here and too much like a professor, let me emphasize here that competition has a particular meaning for economists that

lay people usually don't think about. Namely, it's a situation in which neither buyers or sellers interacting on a market have control over prices that they charge. So that, obviously, buyers are what?

They are out to get the product or the service for the lowest possible price, but as long as none of them have control they can't sort of get it at too low a price, a price that wouldn't enable a seller to operate.

Similarly, a seller wants to get it at the highest possible price, but as long as there is competition between sellers, they can't charge what?

A very high price and earn what we call monopoly profits, as a consequence.

I want to explain that, because laymen will talk about, and businessmen will talk about how they are subject to a great deal of competition.

This is true, for example, in the auto industry. They always talk about the compe-

tition in the auto (118) industry, but notice from an economist's definition of competition, namely, that no one buyer or seller has control over price; that doesn't pertain to the auto industry because General Motors pretty much sets the price in the industry and others follow suit.

Q. Does pure competition exist anywhere?

A. Perfect competition does not. One of the reasons it doesn't exist anywhere is that consumers don't have perfect information.

Q. That's one of the reasons, only?

A. Yes, one of the reasons.

On the other hand, there may be what economists always like to refer to as workable competition. Namely, given sort of the uncertainties and the imperfections that exist in the world, you could think of a situation--what?

In which consumers are relatively informed and in which marketplaces are



relatively competitive.

So, you could go from a situation, basically, as exists in agriculture and farming --another industry that is probably pretty workably competitive is textile manufacturing--all the way to situations which very few economists, if any, indeed would claim are very workably competitive, such as the auto industry, to pick out a good industry, and then a great deal of service industries, including doctors and lawyers.

(119) Q. All right. Back to the studies you mentioned. The Respondents' Exhibit 13, which I believe you have-- Mr. Chairman has--has to do with drug advertising. Who wrote that study?

A. Professor Cady. He is a professor of marketing at the University of Arizona. He wrote the study, or did the study for an institute called the American Enterprise Institute, in Washington.

Q. Do you have an opinion well, before I ask that question, I should say: Could you give us a brief statement of what the study says?

A. Yes. Here was a perfect opportunity for Professor Cady to examine what impact advertising has on the prices of prescription drugs. The reason, it's as close to a laboratory perfect situation as you can get in economics is that in some states there are bans on advertising, all the way from say an absolute ban to say bans on price advertising, to states where there are no bans whatsoever on advertising.

A medical survey, or a survey had been done by an outside marketing firm on what people were spending on their medical expenditures. People are making one of which was what? What are you spending on drugs? What drugs are you buying and what prices are you paying for drugs?

(120) So, here is a perfect setting

for Professor Cady. Namely, he was able to take this proce statement and look at the prices that people were paying for 10 commonly prescribed drugs across states, and was able to look at basically the mean prices that people were paying for these drugs in states where there was a ban on advertising, and the mean price they were paying for these drugs in states where there was no such ban, and basically found in the states where there was no ban on advertising the mean price was about five percent, is statistically significantly lower where there was a ban on advertising on prescription drug products.

Q. Do you have an opinion in regard to the reliability of the underlying survey regarding medical expenditures?

A. Well, the survey was --

MR. FRANK: You have lost me. What is that underlying survey?

Q. BY MR. CANBY: You said that --

A. It was done by a marketing firm here.

Q. It seems to me there are two things. If I may explain, one is there was a pre-existing survey dealing with how much was being spent on drugs in various places?

A. By the R.A. Gosselin Company, marketing research outfit.

(121) Q. Then this study which takes the data, and --

A. -- basically analyzes.

Q. Compares it with the effect of various relative bans on advertising.

MR. FRANK: Thank you. I must have missed that.

THE CHAIRMAN: Are you asking the witness to vouch for the reliability of the data upon which the conclusions were drawn?

MR. CANBY: I'm asking for reliability, the methods basically. In other words, what does he think of this study.

A. I don't have any information on the survey, the actual collection of the

price data. I trust that since Professor Cady and the American Enterprise Institute, which is a very reputable institute, used the study, I trust that the survey were very reliable and quite valid.

The study here, the things that Professor Cady did with the price data were indeed quite valid and quite reliable. Namely, he not only looked at the price differences between states with the ban and without, but went beyond and said: Are there other factors which could explain this differential?

Basically, did we see this lower price in states where there was no ban on advertising, but that consumers for that low price suffered some other disutility?

(122) Namely, although, you couldn't claim here an inferior product, because basically the retail establishments have nothing to do with that; that's the drug company, but could the customer for this

lower price suffer any kind of service differential?

Did they not receive -- and he looked at four or five different services.

For example, in the states where advertising was allowed, did firms grow to very large sizes, and those large firms not give any kind or sort of personal type services that a small establishment might give?

And he looked at delivery; service; credit; emergency service; the keeping of records, and then amenities in terms of waiting area where you could sort of go in and sit down and wait for your drugs, or whatever, and found that there was no statistically significant difference in service, where the consumer in these states where there was a ban on advertising and thus where consumers were paying a lower price, there was no -- in the state where the consumers were paying a lower



price for the drug, they were not getting any less service; they were getting just as good service.

Q. Those were the states that tended to be, on the average, where advertising of prices was permitted?

A. That's right. They got it for a lower price, and (123) no less service.

Q. Let's examine the other Exhibit, Respondents' Exhibit 14. This has to do with comparative price of eyeglasses. Who was the author of this study?

A. Professor Benham. He is the professor of economics. At the time he was at the University of Chicago; now he is at the University of Washington in St. Louis.

Q. Do you have an opinion about the methods of this study?

A. It's really the same kind of thing that Professor Cady did. He had sort of a golden laboratory experiment. Namely, there are some states where there is a ban

on the advertising of eyeglasses; other states where there is not.

He had the advantage of having, from an independent survey, data on the prices people were paying for eyeglasses across states, and again found that difference.

Now, he did something slightly different. He looked at -- like Cady, he lumped sort of all the states that had any kind of a ban, partial, absolute; any kind of a ban, and those states that did not; found about a five or six dollar differential on a 30 to \$40 pair of eyeglasses.

(124) Then, he said, "What might be the outside figure that people will be paying due to bans on advertising?"

So, he took a state, North Carolina, which had an absolute ban. You couldn't advertise anything anywhere and took states where there were no bans, Texas and the District of Columbia, and the differential jumped to \$19. Admittedly, this is the

largest kind of an increase in price that could be expected in the ban; in this case, an absolute ban.

Q. Did this study include fitting glasses?

A. Yes. In fact, for some of the sample consumers, they did not separate the price of eyeglasses from the combined price of the eye examination and eyeglasses. So, here, was also involved the examination, as well as the fitting and the prescription of the eyeglasses.

Q. Was there any way of telling whether the level of services was being differentiated?

A. Well, not really in terms of eye examinations. He looked at information the consumers that reported the prices of eyeglasses only, and would be corrected for the types of people buying eyeglasses.

So, somebody might claim, for example, in states where there was a ban on advert-

ising, people may have had higher income and thus wouldn't have been, say, as responsive to prices, and so that's why the prices are (125) higher or they might have been older; there might have been a greater demand for eyeglasses in those states.

Unless the price is lower, higher, so he corrected for what he called social and economic conditions for the individual purchasers, family, and age, and so on, and still found, what?

This price difference.

Second, where he tried to find where maybe there is indeed a ban on advertising and where these prices are higher, the eyeglasses are somehow superior. Superior in terms of glass and cut and fitting and so on.

He did two things. One: He tried to find out where the eyeglasses were made. Was it made by some character who sort of just grinded the glass, or is it some reput-

able firm across these states; and found, basically, whether you are talking about states where there is a ban or states without a ban, the retail establishments were basically getting their eyeglasses from three major firms, Bausch and Lomb.

Then, he did a personal, I guess, survey of New Mexico and Texas, two contiguous states; Texas being nonban; having some ban, and really inquiring of optometrists and so on, whether indeed the quality of eyeglasses differ between those two states, and found that there was none.

(126) MR. DIVELBISS: What was that last answer?

THE WITNESS: There was none.

A. (Continuing) So, the price differentials couldn't be explained by individual buyer characteristics, and that is the demand in the state where there was a ban on advertising was greater, claiming a higher price, and there also was no quality

differential explaining the lower price.

Q. BY MR. CANBY: Is it fair to conclude from your examination of these studies and from any other experiments that you have done that a ban on price advertising in general marketing tends to drive up prices?

A. You are being very cautious. I can be even stronger. The answer definitely is yes.

In fact, as you know, economists have a reputation for not agreeing on too many things. Here is one area, namely, price advertising, where I think you'd find it very difficult, if not impossible, to get any economist in this country to come and sit in this chair and claim otherwise. Namely, you get any economist you want to go out and pick up -- all right -- and they are going to sit in this chair and they are going to respond, what?

Yes, price advertising is pro-com-



petitive and will decrease prices, and conversely, a ban on price (127) advertising will be anti-competitive and will increase prices.

There are very few areas where they are going to get that kind of an agreement among economists, but here's one of them.

Q. Let me inform you that the legal profession, generally, and the legal profession in Arizona, specifically, has a ban on advertising to the public, which includes a ban on the advertising of prices.

Are you familiar with that fact?

A. Yes.

Q. Do you know of any studies that have been done on the effect of the ban on advertising in the professions?

A. No. As far as I know, there are none. One of the primary reasons I think there are none is that we don't have a laboratory situation to work with; namely, I don't know of any states where there is

no such ban.

If there are any, please tell me and I can do a study.

Q. Are there any kind of studies that could be done on the effect of a total ban, when the ban is total?

In other words, could any studies be done in the legal profession, and the effect of the advertising ban, economically?

A. Well, if you had a situation where, say, there (128) were some states with a total ban on advertising and other states where the ban were not so total, they would allow some kind of advertising, or they would allow advertising, say, in some media, you might be able to do the experiment, the kind of experiment that was done here, but you have to be fairly careful, because if, let's say, the partial bans are such that -- well, the kind of thing that I know, the American Bar Association, I believe, just recently passed, stating that lawyers, as

far as they were concerned now, I guess, could advertise in professionally accepted places or something like that.

Q. May I interrupt you. There have been certain law lists that have always been able to advertise, to put their names in. They are of limited circulation.

My understanding of the ABA change, which is now in evidence, is that it would be permissible for lawyers to advertise a certified specialty in the Yellow Pages, and a price for consultation in the Yellow Pages.

A. That would be a little different from the limited sources.

MR. FRANK: Pardon me. What question is pending before the witness? I have lost track.

Would you mind restating it.

MR. CANBY: I have to restate it.

The question is: Is there anything, really, that (129) could be studied?

I interrupted his answer.

I think his answer so far: The differences in permissibility of advertising are marginal.

A. (Continuing) Could anything be done--

MR. FRANK: Please, Mr. Chairman, I would like, please, before the witness answers further to have something that ends with a question mark.

MR. CANBY: All right. I think that's been answered adequately.

Q. BY MR. CANBY: Is one of these studies quite a considerable undertaking?

Let's take the drug price study.

A. The major undertaking is the gathering of price data. From there, it's really not too major an undertaking, other than sort of a library reserach (sic) as to what prohibitions and what laws exist in each state.

Q. Do you know of any body of under-

lying data available in the legal profession regarding legal services which would permit such a study?

A. No.

Q. That is not something, I presume, that can be gathered by one or two people in a few weeks.

A. No, certainly not.

Q. Mr. Cox, let me show you Bar Exhibit No. 6. That (130) is an advertisement placed in the "Arizona Republic" by the Respondents in this case.

Do you have an opinion on the competitive effect of that kind of advertisement, or, in fact, that advertisement?

A. Yes, indeed, I do have an opinion.

Here is a classic illustration of what economists would call price advertising, namely, the reporting of the goods or service -- in this case a service being rendered and the price that's going to be charged for such a service.

As I previously stated, I can't think of an economist who wouldn't claim that price advertisements do not have a competitive effect.

MR. FRANK: Pardon me. What we are now hearing is kind of removed, I think, from the question. I don't want to make an objection, but I wonder if we could have --

THE CHAIRMAN: Break it down.

MR. CANBY: The question and answer a little bit more?

THE CHAIRMAN: I may say I read the answer as being responsive to the question, but you may proceed.

MR. CANBY: Very well.

Q. BY MR. CANBY: What is your opinion concerning the competitive effect of a change in the rule which would (131) permit any attorney to advertise prices?

A. My opinion is the effect will be one of increase in competition and a lowering of prices for consumers.



Q. Won't that lower the quality?

A. Not if these studies hold up.

That's a much harder question to answer.

All right. But the two studies that have been done, now, admittedly are on products rather than services, retail drugs and eyeglasses, although the drugs might be a little better example for this case at hand, because there specifically they looked at: Did less services accompany the lower prices? And the answer was no.

So, I have to say it's my opinion that the quality of services would not necessarily decrease as a result of the lower price, due to the advertising.

Q. Are there service industries in the United States that are workably competitive?

Is there any service industry?

A. Oh, sure. Any one into which basically there is not a substantial barrier to entry of labor. The service industries are highly labor intensive. All right.

The things that makes a service industry tend to be anticompetitive or uncompetitive, not workably competitive would be if, what?

If a laborer couldn't get into the area. Okay.

(132) Now, I remind you of there is no perfectly competitive situation. There is no situation in which you can wave your magic wand and be a barber or a beautician or whatever. All right. But anything like that, you know, lawn services, barbers, beauticians, there is relatively free entry. As a consequence, the service industries are workably competitive and the prices are about as low as the source could say will allow them to go.

Q. Is there any reason to believe that competition affects quality in the workably competitive services?

A. Yes. It increases it, which is probably an answer you didn't suspect.

Namely, when indeed there is genuine competition between sellers -- all right -- not only do they want to, in order to attract customers, offer the service at the lowest possible price, but the very best service that can be offered at that price.

MR. CANBY: I have no further questions.

THE CHAIRMAN: Mr. Frank.

#### EXAMINATION

BY MR. FRANK:

Q. Mr. Cox, with reference to the study of drug prices in article 13, I believe the drugs are listed at (133) page 8 in the article; isn't that correct?

THE CHAIRMAN: You meant Exhibit 13.

MR. FRANK: Thank you. Did I mis-speak? Exhibit 13.

Q. BY MR. FRANK: Now, those are all standard items produced by national manufacturers, and then distributed in local drug stores; aren't they?

A. Yes, as far as I know.

Q. So that these are items in which when the druggist gets the prescription, he simply goes to the shelf; gets a large bottle; pours out some standard items and puts them in a smaller bottle and hands them over and charges some money; isn't that true?

A. Okay. Basically.

Q. Isn't that true?

A. Basically.

Q. They are totally standard; interchangeable?

A. The drugs aren't interchangeable.

Q. No, but all Darvon Compound 65 is simply the same, and the drug company turns it out by a machine, and it goes on, doesn't it?

A. Yes.

Q. And this is what the article is about, the effect of pricing on standardized items?

A. The effect of retail price.

Q. Now let us turn to the matter of the eyeglass (134) study. You had some talk about the relation of the examination and the eyeglasses. The fact is that this is a study of effective advertising on the prices of eyeglasses only and not of the examinations; isn't it?

A. Yes.

Q. The discretionary element of examination is totally irrelevant to what this article purports to cover?

A. Some other member -- if Benham had been doing the survey, all he would have asked for was the price of the eyeglasses, because that's what he was interested in. Now, because he hadn't done the survey; it had been done by somebody else at some other time, some of the consumers responding had given only the price for both examinations and eyeglasses, but in that case he basically just assumed that the price for the examinations was the same

across these states. All right. The variance was to the price of eyeglasses.

Q. I'd like to ask if we can agree that what you have just said is said explicitly in the article at page 341, the systematic variation and total cost examined here is assumed to reflect variation in the cost of the eyeglasses, excluding the examinations; isn't that so?

A. That's right.

Q. What, then, they are talking about is the business of going to the person who manufacturers the (135) glasses after there has been a prescription and who sells, first of all, the frames; isn't that so.

A. Yes.

Q. And said that those frames, all of them, came from two or three manufacturers in the United States?

A. Not the frames, the glass itself.

Q. Where did the frames come from?

A. I don't know.



Q. But, at least, they are nationally produced; they are items simply on the shelf in the eyeglass seller's store, aren't they?

A. Well, two parts to that question. I don't know whether the frames are nationally produced.

You are correct, yes, the frames are there at the local retail establishment.

Q. Right. And the lenses, you say, are all produced by three national concerns; is that correct?

A. Well, I think the figure in there is about 70 percent, the vast majority.

Q. And what the fellow does who is being studied here, he takes the prescription; takes the standard lens appropriate for the purpose, produced by a national manufacturer; he fits the lens into the frames and glues it into place; isn't that so?

A. Yes. I don't know if he glues it.

(136) Q. Attaches it.

A. Yes.

Q. That's his function. He then -- you had some talk about fitting. The fitting consists of having a fellow in a white coat, usually, sit down across from the customer and hands them the glasses, and kinds of fiddles with them a little to see if they hurt his ears; isn't that so?

A. Yes. That's basically been my experience, as well.

Q. And the sole professional judgment that is performed by the vendor of that item is to wiggle the frame on the glass a little bit, where there is a wire in the middle of it, in a gentle way, to make it fit over the ear, isn't that so?

A. Let's not be totally unfair to the person selling you the eyeglasses. He does have to do what?

Make sure the glass piece he is giving you --

Q. Is the one you asked for?

A. -- fits the prescription that the doctor has written out.

Q. Right. I agree.

A. So the guy is not totally devoid here, or the person is not totally devoid here of judgment.

Q. But it's close.

(137) Should we add that the druggist, also, has to be sure that he is giving you Darvon and not Ovulen?

A. Yes.

Q. He has to be able to read, and he has to be able to count?

A. Yes. He especially has to be able to read the doctor's writing.

Q. Now, in short, in these two studies we are dealing with about the most standardized items that could be conceivably found; aren't they?

A. As far as the retail establishment is concerned, yes.

Q. Yes. All right, now, you have said that if advertising were -- if the advertising ban were eliminated for lawyers, you would then like to do a similar study as it relates to legal services, and I'd like to ask you a couple questions about the study that you contemplate in that prospective day. I'll ask about, if your don't mind, my own areas of specialization, which is the field of appeals to various courts.

Assuming that all bans on advertising were lifted for lawyers; what kind of a study would you anticipate doing concerning appeals?

A. Well, it would be more than these, because notice this can be done at a moment in time. All right. If the (138) ban is lifted, then you have got to compare a cross-time. More ideal, would be for some states to lift the ban then at a moment in time, namely say 1977; look at the states that lifted the ban and those states that

still have that.

Q. We'll give you that. Let's say most of the states, adjacent states, one retails and one doesn't. You are going to do this study, and you are going to do it on the matter of appeals, if you don't mind.

What is it that you are going to be looking for?

A. You'll look for -- you'll try to standardize on two dimensions.

Q. What would that be?

A. One, on the service being rendered.

Q. Right.

A. Okay. So, in your case, appeals on say a murder conviction, or appeal on some antitrust violation --

Q. All right. Let's take an appeal on a murder conviction. I have just been through one of those.

A. Well, that's it, basically. You'd want to make sure that you are comparing, what? Like cases.

An appeal, the price charged for an appeal on a murder conviction in one state, where there is a ban on advertising and an appeal on a murder conviction in a state where there is no such ban.

Then, the second --

(139) Q. So now, we have got all murder cases in banning states, and all murder cases in nonbanning states; is that right? We are going to compare those?

A. The prices charged for appealing of such a case.

Q. Right.

A. The second dimension on which you'd want to standardize is basically the lawyer doing the appeal. Is the lawyer in each case as comparable as you can make it?

Obviously, there is not going to be perfect comparability. You can statistically account for some degrees of incomparability.

So, remember in the eyeglasses, remember



they tried to explain the price differences based on what?

Not just the ban on advertising but on the characteristics of the person buying.

Now, this is a little bit different. Namely, you try to be standardizing on lawyers.

Do you want me to anticipate another question?

Q. No, I'd rather you didn't, if you don't mind. It would be easier if I asked them and you answer them.

Isn't it true, unless we can standardize the murders and the lawyers, we can't make that study? Isn't that true? Yes or no?

A. No.

Q. Then, explain.

(140) A. My answer is no, if you are going to make me say "Yes" or "No".

Q. Then, explain. Make your comment.

A. I'll make an analogy. Just as I

responded earlier to the fact that there is no such thing as perfect competition; on the other hand, you can use a little judgment in terms of whether claiming something is basically workably competitive and something is not.

The same thing is true here. You are never going to get two perfectly comparable lawyers. In fact, by definition, they'd have to be one in the same person divided up into two people in carna to have that. But you can try to get two degrees of lawyers as comparable as possible, the same number of years, the same number of cases handled on appeal, the same number of cases won; so on and so forth.

Q. Let's pause for a moment to be sure I understand. We have to be able to standardize the murders and the lawyers both, murder cases and the lawyers somehow, in order to be able to make this kind of study; isn't that true?

A. You have to make some attempt at standardization, that is correct.

Q. I'll ask you to assume for a moment, hypothetically, that that can't be done, you can't (141) standardize the murders and you can't standardize the lawyers. If that hypotheses is true, you can't have that kind of study.

A. That is correct.

Q. If that is so, it would be impossible to demonstrate by any means known to you that advertising had an effect by way of lowering prices; isn't that so?

A. With certainty, that's correct.

Q. Now, if I advise you that to take, first of all, murders, that is a matter in which I can't suppose that you would have expertise, reasonably; so just let me honestly advise you they range terribly from matters that are so open and shut that a couple of hours will dispose of it, what we call Anders cases, to matters which may

take many people months of hard work.

Are you aware of the extreme range of difficulty that there may be in murder cases?

A. Certainly. I can imagine that, sure.

Q. Can you accept the assumption comfortably that they are about as far away from standard items poured out of a bottle as you can get, in terms of the degree of nonstandardization which they have?

Can you accept that?

A. Yes. I make the analogy of students, they are about as wide a range of skill and interest as you can get.

(142) Q. A pretty diverse lot?

A. Yes.

Q. Now, are there any empirical studies which have been made of the effect of advertising on the price of wholly nonstandard items?

A. No, and it would be inappropriate to

do so.

Q. You testified that if there were advertising, it would lead to price competition for lawyers. Was that your opinion?

A. That's my opinion, yes.

Q. Did you also, I think, testify that it was your opinion that such competition would increase the quality of legal services?

A. It certainly wouldn't, in my opinion, decrease it, and it might very well increase it, yes.

Q. But that is based wholly upon the studies, so far as there is any factual basis for that in the sale of standard items; isn't that true?

A. No, not entirely true.

Q. Name any other study on which you base that opinion?

A. It's not a study, it's basically sort of logical set of reasoning. Namely, that since I conclude that it will have an

effect on competition -- all right -- namely, increased competition, and on the assumption that a (143) seller always wants to do what? Sell his product or service. In this case, service.

He is going to do what?

He is going to attempt to sell the very best service at the lowest probable price, in order to do what?

To attract the business.

Q. Do you have an opinion as to whether competition exists at the present time amongst lawyers?

A. Yes, I do have an opinion?

Q. What is that opinion?

A. It doesn't exist.

Q. There is no competition among lawyers; is that your opinion?

A. There is no workable degree of competition among lawyers, that is correct. That is my opinion.

Q. Do you base that on readings of any



particular sort?

A. No, I base it on one very simple fact, and that is, entry to the legal profession is not relatively free, and without such entry there cannot be a high degree of workable competition.

Q. What do you mean when you say entry is not free?

A. You, one, have to first go to law school -- you can better inform me here -- you have to pass a bar exam, right? And I guess, in most states, to even be accepted (144) for a bar exam you have to go to law school.

Namely, you cannot set up the practice of law in many states simply because you know the state of law. You have to have done what?

You have to have gone to law school and passed the bar exam, and law school admissions; they are not open; they are limited.

Q. I advise you that there are approximately 4,000 attorneys admitted to the Bar in this state, all of whom have gone to law school; taken the bar examination and been admitted -- substantially all; any exceptions are too minor to matter, and it is, I believe, the opinion that you were expressing that there is no competition among those 4,000 lawyers?

A. No workable degree of competition. That is correct.

MR. FRANK: I have no further questions.

#### EXAMINATION

BY MR. CANBY:

Q. By "workable degree of competition", you were referring to the definitions you gave at the beginning of your testimony?

A. Yes.

Q. Is that right?

(145) A. Yes, plus the common misconception among noneconomists that the number of sellers in competition are synonymous

and that just is not the case.

Q. But, in other words, you are giving an economic definition of workable competition?

A. That's right.

Q. You were asked a hypothetical on whether you could make a study when legal services could not be standardized. Your answer as I understand it, was "No".

You were asked to accept it as a hypothetical. Do you accept the proposition that legal services cannot be standardized?

A. No, I don't.

Q. Do you think it would depend at all on the legal service in question?

A. Yes. Some services will be able to be made more comparable than others, certainly.

Writing a simple will, seems to me, to be a service that might lend itself to greater comparability across people than say handling a first degree murder case.

Q. Would you say that the more routin-

ization -- if that's a word -- that there is, the easier it would be to establish comparability?

A. Yes, certainly.

(146) Q. Even though there is no workable competition among lawyers, because of restricted entry, would price competition bring the existing system closer to workable competition?

A. Certainly, because one aspect of workable competition is the price charged, and I have no doubt that for same quality service the price would fall.

Q. One further question: If you would assume that it is the practice of many attorneys for many services to quote a flat fee or a flat hourly rate before they embark on the work, when they are first talking with the client; assume that practice for the question; then, assume that lawyers advertise that information in media of public distribution, like newspapers; would

that have any effect on the economics of the practice?

A. Yes, indeed. In fact, there is a very comparable type situation to what you are getting at in defense contracts. It's known as cost plus fixed fee. Okay. That is, we'll sort of add up the cost; you pay whatever they turn out to be, plus a certain profit that we stipulate or that we stipulate or that we agree versus what is called a firm fixed fee contract. Namely, to the government you bid so much money to produce whatever stated amount of tanks or ships or whatever. Okay.

Then, obviously, you base your fee on what you (147) project costs to be. Okay.

If you actually end up doing, what? Not incurring that many costs, your profits go up. If your costs are higher than what you anticipated the fee charged the government, is still fixed, and so your profits do what? Go down. All right.

That, obviously, from the seller's point of view -- and I can't even imagine any seller in the private market that wouldn't always like to operate on what? A cost plus fixed fee basis, but competition prevents that. Competition doesn't allow it. The same thing here you are talking about in terms of law.

Q. Well, I think that's one of the things my question involves.

The other is, let's say as a lawyer, a particular lawyer is willing to tell an individual client whenever one comes to his office that he will do an uncontested divorce for \$250, and that is his means of informing his potential client. Isn't that just as competitive as advertising in the newspaper?

A. Charging it without advertising is what you are saying? I didn't understand.

Q. I'm saying is there a difference between stating your fee when the client comes to you -- is there a difference be-



tween competitive effect between stating (148) when the client comes to you and stating your fee in the "Phoenix Republic"?

A. Slightly, and it's the cost to the consumer of acquiring such information. Namely, if it's allowed in the newspaper -- all right -- a person can obtain such price information by simply doing what? Picking up the newspaper and maybe flipping from page 2 to page 3 to page 4 -- okay -- and finding out, comparing between Lawyer 1, Lawyer 2 and Lawyer 3.

If that is not stated in the newspaper, but only stated in the office, upon walking in, how, then, does one acquire how much Lawyer 1, 2 and 3 charges?

He has to go to Lawyer 1's firm; go to Lawyer 2's firm, and use up what scarce time and resources he has in gathering that information; information that most likely, under those circumstances, won't be obtained, as is clearly the case in retail drugs.

Right now, even though retail drugs in many states can't be advertised, you can acquire the price information -- not over the phone -- I tried that in Washington, D.C.; they wouldn't give me the information over the phone. I had to appear in person.

Why does a producer require you to do this? Because he knows by requiring you to come in person raises the price of information thus reducing the probability (149) you are gathering the information, thus reducing your market, to have to appear to acquire the information, thus increasing the price to the consumer.

MR. CANBY: No further questions.

MR. FRANK: No questions.

THE CHAIRMAN: Does any member of the Committee have a question of the witness?

Mr. Canby, will you call your next witness or take whatever action is appropriate.

Thank you, Mr. Cox. Nice to see you.

(Witness excused.)

MR. CANBY: I will now recall Mr. Bates and Mr. O'Steen; if we can do it the same way this time.

THE CHAIRMAN: The witnesses O'Steen and Bates may resume the stand.

\* \* \* \*

BERNARD VAN O'STEEN, a Respondent, resumes the stand and testifies further as follows:

JOHN R. BATES, a Respondent, resumes the stand and testifies further as follows:

THE CHAIRMAN: You gentlemen are reminded you are (150) still under oath in these proceedings.

#### EXAMINATION

BY MR. CANBY:

Q. One or two preliminary questions. You both stated that you graduated from Arizona State University.

You were cum laude, weren't you, Mr. O'Steen?

A. BY MR. O'STEEN: Yes.

Q. Mr. Bates, I recall you won some sort of an award at graduation. What was that?

A. BY MR. BATES: I was chosen by the faculty as being the top student in my class.

Q. You went to work for Legal Aid for approximately two years, thereafter?

A. BY MR. BATES: Close to it.

Q. A year and a half.

In your present practice, have you taken any cases for no fee at all? Mr. O'Steen, perhaps can answer it.

A. BY MR. O'STEEN: Yes, we have.

Q. Have you done many cases for no fee at all?

THE CHAIRMAN: How many is "many"?

Q. BY MR. CANBY: How many cases have you done?

A. BY MR. O'STEEN: Gosh, I'm not really equipped to answer that question.

We have done a fair number of cases (151) at no fee at all, under varying circumstances.

THE CHAIRMAN: More than 25?

WITNESS O'STEEN: I would say more than 25.

THE CHAIRMAN: More than 50?

WITNESS O'STEEN: I imagine that's getting pretty close.

THE CHAIRMAN: All right, that's close enough.

Q. BY MR. CANBY: Under what circumstances did you do these cases?

Why, in other words, did you take it for no fee at all?

A. BY MR. O'STEEN: Various circumstances. We are members of the Legal Aid Society Referral Panel and are called upon periodically to take cases for no fee from the Legal Aid Society. We cooperate.

Q. Is that something for which you volunteer?

A. BY MR. O'STEEN: Yes. In addition, we are on the Maricopa County Bar Association Lawyer Referral Panel, and I think it's no secret that many of the people who are seeking attorneys through that organization are not equipped to pay much of a fee, and the panel handles cases that have come through that source.

We have just occasionally made the judgment, based upon our contact with a client at the office; that client was unable to pay and in need of service, and we (152) have occasionally done work at no fee that way.

The fourth category is, unhappily, the business of not getting your money in advance all the time.

Q. That's not really promono (sic) work on purpose?

A. BY MR. O'STEEN: No.

Q. You are also, aren't you, Mr. O'Steen on the Board of Public Interest Law



Firm here in Phoenix?

A. BY MR. O'STEEN: Yes the board of directors.

\* \* \* \*

Q. BY MR. CANBY: Mr. O'Steen, do you have any idea what the effect of the advertisement in the "Arizona Republic" was in bringing clients to your office?

A. BY MR. O'STEEN: Yes, I have a very good idea.

Q. Have you made some sort of compilation of that, at my request?

A. BY MR. O'STEEN: Yes, I have.

Q. Do you have that with you?

A. BY MR. O'STEEN: Yes, I do. I'm sorry, this was put together hastily, and we really didn't get as many copies as we should have, together.

THE CHAIRMAN: There is only one necessary for the (162) record.

WITNESS O'STEEN: I should add a date on that, if you don't mind.

MR. CANBY: Well, I'll ask you that. May we mark Respondents' Exhibit 17?

THE CHAIRMAN: Yes.

(Document marked Respondents' Exhibit No. 17 for identification by the Notary.)

THE CHAIRMAN: Can you give a title for this list?

MR. CANBY: Compilation of Cases Open Due to Advertising. That's a cumbersome title.

THE CHAIRMAN: Okay.

Q. BY MR. CANBY: You have numbers of cases listed in this document, which is now Respondents' Exhibit 17. There is a list of cases saying, "Cases Opened After Advertising". This is occupying the top half of the page. This is total cases your office has opened after date of publishing ads?

A. BY MR. O'STEEN: Yes.

Q. You have a column at the lower part of the page saying, "Cases Opened Due to Advertising". Now, several cases are listed

there. Why do you list cases being "Opened Due to Advertising"? How do you know?

A. BY MR. O'STEEN: We have an intake, brief intake sheet that each prospective client completes upon (163) entering the office, before that person sees an attorney. One of the questions on that intake sheet is: "How did you find out about us?" and we have reviewed those intake sheets to arrive at those figures.

Now, the only exception to that is that we have a special intake sheet for prospective divorce clients. That intake does not include the question about the source of information about the firm. Therefore, we don't have such information on divorce clients, but we do have it on all others. As you can see, there is a correction for that.

Q. So you have opened a total of 75 cases since the ad was published; five of those cases, if I read this correctly, were

domestic relations cases?

A. BY MR. O'STEEN: I believe that's correct, yes.

Q. And you have no way of knowing why they came to you?

A. BY MR. O'STEEN: No.

Q. That leaves 40 cases?

A. BY MR. O'STEEN: Yes.

Q. Other types?

A. BY MR. O'STEEN: Yes.

Q. Of those, you have listed by category cases that came to you, and you list 24 out of 40 as having come to you, at least of having answered the question on (164) the intake sheet of coming to you because of advertising; is that correct?

A. BY MR. O'STEEN: That's right.

Q. And the figures here were compiled from your own intake sheets by you or persons under your direction?

A. BY MR. O'STEEN: Yes.

MR. CANBY: I'll offer Respondents'

Exhibit 17.

MR. FRANK: May I ask a question or two on voir dire?

THE CHAIRMAN: Yes, you may.

VOIR DIRE EXAMINATION

BY MR. FRANK:

Q. MR. O'Steen, this ad is approximately eight inches by two inches; is that the description?

A. BY MR. O'STEEN: Eight by two column inches, I believe.

Q. Suppose, hypothetically, someone put a two column-eight inch ad in the back of the paper, or the same page you did, saying, "Striped elephant on display", and gave a place, and suppose further that the newspaper carried on page 1 a story on the wonders of the striped elephant; if that afternoon quite a lot of people went to see the elephant, would you be able to tell whether it was the ad or the news story?

A. BY MR. O'STEEN: I wouldn't be able

to tell.

(165) Q. In your case, you had a two column-eight inch ad in the paper; isn't that so?

A. BY MR. O'STEEN: That's right.

Q. And there were other news stories about your ads, about the Bar and discipline and so on, and this very matter. So, therefore, the very existence of the ad has been an item of rather substantial news; isn't that true?

A. BY MR. O'STEEN: Yes. I think that's a fair statement.

Q. Do you really think that you are able, in this case, to attribute cases to the ad any better than you could attribute views of the striped elephant and the hypothetical I gave you in the first place?

You don't need to answer that, I will not object.

THE CHAIRMAN: Well, Exhibit 17 may be received in evidence, by Mr. Canby, for



whatever it may be worth in these proceedings.

(Respondents' Exhibit 17 received in evidence.)

# EXAMINATION

BY MR. CANBY:

Q. What does your intake sheet actually say, the (166) question that the people are answering which led to this compilation?

A. BY MR. BATES: I think it says --

THE CHAIRMAN: This is Mr. Bates responding.

A. BY MR. BATES: -- it says, "Who referred you to us?" or "How did you hear about it?" That's very close.

Q. What kind of answers did you have put, "Due to advertising" on this sheet?

A. BY MR. BATES: Most of the people would say, "We saw your ad," or some people just said, "Newspaper."

Q. So, in saying "Newspaper", they can be referring to the front page story or

they could be referring to the ad, or a combination?

A. BY MR. BATES: However, it's possible many people already knew what we charge, and they could only find out after seeing our ad.

WITNESS O'STEEN: That's significant.

Q. Which they might have seen because they read the front page story?

A. BY MR. O'STEEN: Yes.

MR. CANBY: I have no other questions.

THE CHAIRMAN: I think we can take judicial notice of the fact that every paper had a front page story referring to the ad.

(167)

# EXAMINATION

BY THE CHAIRMAN:

Q. I want to ask this question of either of you who is more knowledgeable concerning the nature of the responses which are found on the information sheet, which you have been addressing your testi-

mony. Would that be you, Mr. Bates?

A. BY MR. BATES: Fine. I didn't understand the question.

MR. CANBY: I didn't understand your question.

THE CHAIRMAN: I haven't asked it yet.

Q. BY THE CHAIRMAN: Prior to the time you placed your advertisement, what kind of responses were you finding on the information sheet that told you how the prospective clients had heard of you?

A. BY MR. BATES: Frequently, it was just another friend, an acquaintance; they would mention the name.

Q. Probably a prior client of yours, a recommendation?

A. BY MR. BATES: Frequently, or a friend of a prior client. They sometimes would mention various agencies. LEAP is an example, I suppose, of somebody who would know of our existence and would mention us,

among other attorneys who would be available.

As you know, Legal Assistance Agency here has several panels, and that's another way that people would (168) find out about us and write that down.

Q. Certain social service type agencies in the community would be aware of your existence, and perhaps suggest to an individual that you might be available?

A. BY MR. BATES: Right, but not as often as you might think. By far, the most common was simply from somebody who knew about us.

Q. Do you know what the cost to you of placing the advertisement was?

A. BY MR. BATES: Not precisely. Do you remember?

WITNESS O'STEEN: I know roughly.

Q. Let me have it roughly.

A. BY MR. O'STEEN: About \$260.

Q. \$260.

If you were permitted to repeat the advertisement as frequently as you opted to do, do you have any notion as to how often you would run it?

A. BY MR. O'STEEN: Is that addressed to me, Mr. von Ammon?

Q. If you can answer it, Mr. O'Steen.

A. BY MR. O'STEEN: No, I don't think we do. We have not reached the point where we felt comfortable to think about that.

Q. What I am concerned about is, if you can speak to (169) this issue, is the extent to which that added cost of operation would result in increasing charges to clients because of additional overhead. Do you regard it as nominal or substantial?

A. BY MR. O'STEEN: Well, the net effect of it, I think, is that prices will go down, because of increased volume. We'll be able to charge lower fees, in spite of the additional cost of advertising. That's my feeling.

There is no question that will be an advertising input into the budget, or drain on the budget for advertising, but it would be more than compensated for by the additional business.

Q. Offset by the volume, assuming you are able to arrive at any estimates of the potential increase in the volume, which would be generated by advertising, on the basis of the experience you have had thus far?

A. BY MR. O'STEEN: Yes, sir.

THE CHAIRMAN: That's all I have.

MR. CANBY: I did have a question or two left.

#### EXAMINATION

BY MR. CANBY:

Q. One is: Mr. O'Steen, how many cases did you open in the 44 days before you advertised, picking a number out of the air?

(170) A. BY MR. O'STEEN: I have that



information available. Within the 44 days immediately preceding the ad we opened 37 cases.

Q. How many did you open in the 44 days after?

A. BY MR. O'STEEN: 74.

Q. That happens to be exactly double; is that right?

A. BY MR. O'STEEN: That's right. Coincidentally, it is.

Q. Why did you pick the number 44, or why did I ask you 44?

MR. FRANK: What did he have in mind?

Q. BY MR. CANBY: What's the 44? Why did you pick 44 days to compile this information?

A. BY MR. O'STEEN: Because it's exactly 44 days from the day the ad ran until today, so we got the most complete data available, and went 44 days in the other direction.

Q. Those figures were just gross

figures. You won't know why the increase came; it's just broken down by time; is that correct?

A. BY MR. O'STEEN: We know to some extent why some of them came, and because of the other data.

Q. That's in response to the other questions I asked you. That gross figure is just that; correct?

A. BY MR. O'STEEN: Right.

(171) Q. One final question: Do you have any knowledge of the practice among attorneys generally here, or substantial numbers of attorneys regarding if they will quote a flat fee in advance for any legal services by telephone or directly?

A. BY MR. O'STEEN: Yes, I do have knowledge of that practice.

Q. Why do you have knowledge of that? Have you looked into it or have you talked to people?

A. BY MR. O'STEEN: There are two

reasons why I am acquainted with that practice. First, it's because of information of that type, that is, information about fees is a commonly shared thing among attorneys who engage in the same type of practice, at least among the attorneys who do the type of work we do. Attorneys are often comparing the fees with each other, and fee-setting practices.

Q. You have compared with others?

A. BY MR. O'STEEN: Yes, I have discussions with other attorneys all the time about that, and naturally, because of what we are doing we are a source of curiosity, and that topic comes up more often in conversations with other lawyers when we are involved than would ordinarily.

The other reason I know about those practice, that our fees are important to us, that is, the level (172) of the fee which we are charging, and a short time back, approximately six weeks ago, at my

direction, one of our legal assistants conducted probably a pretty unscientific random survey of fees charged by lawyers for typical cases in this area, and the format essentially was that she was instructed to call the attorney's office to inquire as to the fee.

She made these calls to separate offices. First, she made a series of about 10 calls to law offices to inquire for a simple, uncontested dissolution of marriage; then made 10 calls to 10 other firms to determine what their fees for an individual, uncontested bankruptcy, non-business bankruptcy was.

Now, the results of that survey are input into my knowledge of the practice of the fee quoting.

Q. Was it common to have a flat fee quoted?

A. BY MR. O'STEEN: Yes, it was, in both cases. The practice is widespread,

and for certain types of cases, typically nonbusiness bankruptcies, uncontested dissolutions of marriage, name changes, uncontested severance proceedings, the kinds of things that are advertised in the newspaper article, which is an Exhibit here, attorneys commonly charge fixed fees and quote them by telephone upon request, and that was the result of our poll.

(173) Q. Mr. O'Steen, are you a participating attorney to the Arizona Legal Service?

A. BY MR. O'STEEN: Yes, I am.

Q. Under that practice, which is best explained in document Respondents' Exhibit 12, there is a schedule of fees for certain services set forth; is there not?

A. BY MR. O'STEEN: Yes, there is.

Q. And attorneys agree to abide by those fees for that kind of a service; do they not?

A. BY MR. O'STEEN: It's my under-

standing that membership in ALS mandates agreement on the part of the attorney not to charge in excess of the fee quoted in that book, and that is the fee which will be paid by ALS to a member attorney for handling the type of case described.

MR. CANBY: I have no further questions.

THE CHAIRMAN: Mr. Frank.

#### EXAMINATION

BY MR. FRANK:

Q. Mr. O'Steen, in regard to your telephone poll, I believe that you testified that you instructed your staff person to call a number of law offices and ask concerning fees for particular types of work; is that correct?

A. BY MR. O'STEEN: That's right.

(174) Q. That she was to simulate being a prospective client and get the information that way?

A. BY MR. O'STEEN: That's right.



Q. Are you personally familiar with that one of the Canon of Ethics which says that one should deal with candor with fellow members of the Bar?

Seriously, are you?

A. BY MR. O'STEEN: Well, I can't say that I'm aware of that particular provision, but I can say that I abide by it and I don't believe what we did would be a violation of that general point, whether or not it's a disciplinary rule.

Q. Mr. O'Steen, how many different law offices were called by your secretary, and from how many did she get quotations?

A. BY MR. O'STEEN: Altogether, approximately 20.

Q. Who made up the list?

A. BY MR. O'STEEN: I did.

Q. Was this office on the list, my own?

A. BY MR. O'STEEN: No.

Q. What were the criteria by which

you selected the firms that would be on the list?

A. BY MR. O'STEEN: That's why I prefaced my remarks before, by saying that it was a rather unscientific poll, and I sat down with the Bar Directory, (175) and went through it and picked law firms which were of small and medium size, and firms which I knew to be engaged in the general day-to-day practice of law; handling the types of cases we do, divorces and individual bankruptcies, and that sort of thing. I didn't call any large law firms.

Q. Isn't it true that you selected your sample with an eye to getting those that would give you quotations over the phone?

A. BY MR. O'STEEN: No.

Q. But simply took into account whether they do the kind of work which is involved?

A. BY MR. O'STEEN: That's right.

That was really the only criteria, and the size of the firm, as an element of that.

Q. Why did you exclude large firms?

A. BY MR. O'STEEN: Well, it's my experience that large firms don't handle this type of case.

Q. It's your understanding that, for example, this office wouldn't handle a divorce or wouldn't handle a bankruptcy, a personal bankruptcy?

A. BY MR. O'STEEN: It's my understanding that this office doesn't welcome that kind of work.

MR. FRANK: Nothing further.

THE CHAIRMAN: Anything further, Mr. Canby.

(176) MR. CANBY: No.

THE CHAIRMAN: Do you have anything further to present, in any case at all?

MR. CANBY: I have nothing further, and I rest.

THE CHAIRMAN: Why don't you sit here

until the members of the committee vacate.

(The Chairman and Members of the Committee left the hearing room, and shortly thereafter returned.)

THE CHAIRMAN: May we reconvene.

The Committee is of the opinion that its responsibility and duty is limited to a determination as to whether or not the charge that has been brought against the Respondents has been proven. We, therefore, think we have no choice except to make a finding that the charge is proven, because it really is not even disputed; that the advertisement was placed in the "Arizona Republic", in violation of the applicable rule to be found in the Code of Professional Responsibility. We, therefore, will make such a finding.

\* \* \* \*

STIPULATED EXHIBIT

(Dated April 7, 1976)

\* \* \* \*

The following exhibit has been compiled from information supplied by the law firms listed on Schedule A attached. These firms were asked to respond to certain questions. The questions and each firm's response are given. The responses are identified by number only.

It is stipulated that the names of the firms need not be identified with their answers in this exhibit; further, it is stipulated that if the persons responding on behalf of these firms were to appear at the hearing in this matter their testimony would be as set out in this exhibit. It is also stipulated that cross examination is waived and that this exhibit may be admitted.

By: William C. Canby, Jr.  
Attorney for Respondents

By: John P. Frank  
Attorney for the State  
Bar of Arizona

Dated: April 7, 1976

\* \* \* \*

# SCHEDULE A

Rawlins, Ellis, Burrus & Kiewit

Jennings, Strouss & Salmon

Moore & Romley

Lewis and Roca

Snell & Wilmer

Langerman, Begam, Lewis, Leonard and Marks

Streich, Lang, Weeks, Cardon & French

O'Connor, Cavanagh, Anderson, Westover,

Killingsworth & Beshears

Shimmel, Hill, Bishop & Gruender

Flynn, Kimerer, Thinnies & Derrick

Mariscal, Weeks, Lehman & McIntyre

Carson, Messinger, Elliott, Laughlin &

Ragan

Gust, Rosenfeld, Divelbess & Henderson

Ryley, Carlock & Ralston

\* \* \* \*

(1) QUESTION NO. 1. The growth of your firm in number of lawyers and volume of work by way of round numbers and for any period



you wish.

Firm No. 1. 1939-1976--three lawyers to 57.

Firm No. 2. From two lawyers in 1948 to 17 lawyers today.

Firm No. 3. Established in 1957. At that time it consisted of two lawyers and one secretary. At the present time, it consists of eleven lawyers, plus twenty-one non-lawyer employees. The gross dollar volume of professional services has increased by a factor of more than 30.

Firm No. 4. Began in 1969 with four attorneys, and presently has seven.

Firm No. 5. Regarding growth, in the early 1940's it was three lawyers. We are now 36 partners and 13 associates.

Firm No. 6. The firm was originally organized in 1949 and consisted of three lawyers. At the present time, our firm consists of twenty-four attorneys, four law clerks and two paralegals. The staff

size will be increased to twenty-six on June 1 of this year. The gross dollar volume of professional services has increased by a factor in excess of 30.

Firm No. 7. During the past twenty five years of the existence of our firm and its predecessors, we have grown from approximately five lawyers to approximately thirty-six lawyers, and the gross dollar volume of professional services has increased by a factor of more than 20.

Firm No. 8. In the twenty-two years of the writer's association with this firm it has grown from a single office with five lawyers to two offices with approximately twenty-three lawyers. The gross dollar volume for professional services has increased by a factor in excess of twenty.

Firm No. 9. The law firm has grown from two lawyers to our present six lawyers since 1970 and at the same time the gross dollar volume in this firm has increased

by a factor of more than 4.7.

Firm No. 10. The firm had its origin January 1, 1959. Since that time it has grown from three (3) attorneys to its present size of forty-three (43). Our gross dollar volume of professional services has increased by a factor of approximately 60.

(1a) Firm No. 11. The firm was organized in 1937 with only two lawyers, later expanded to 19 and currently consists of 9 lawyers. The dollar amounts, in light of the changes in the firm, are not readily available and probably would not be meaningful in any event.

Firm No. 12. In answer to question No. 1, in 26 years this firm has grown from three to 50 lawyers. The gross dollar volume has increased by a factor of 70 in that time.

Firm No. 13. In the past 10 years, the number of lawyers in this firm has approximately doubled to the present strength

of 23. The gross dollar volume of professional services has approximately quadrupled.

Firm No. 14. In 1946 there were two lawyers in this firm. In 1953 there were four, after one death in 1952. In 1956 there were six. Now, twenty years later, there are sixteen active lawyers and a retired lawyer in "of counsel" category who is essentially inactive. During those years we have lost one member by death and three by withdrawal. Two in the latter category are members of the judiciary.

In the twenty years of 1956 through 1975 the firm's annual gross receipts increased by over 800%, and the annual gross receipts per lawyer by over 300%.

(2) QUESTION NO. 2. Has your firm ever advertised or solicited business in any ways precluded by the Canons?

Firm No. 1. No.

Firm No. 2. No.

Firm No. 3. No.

Firm No. 4. Our firm has never advertised nor solicited business in any way precluded by the Canons, and we have no future plans to advertise or solicit.

Firm No. 5. Our firm has never advertised or solicited business in any way precluded by the Canons.

Firm No. 6. Obviously the firm has never advertised or solicited business in any ways precluded by the Code of Professional Responsibility.

Firm No. 7. The firm has never advertised or solicited business in any way precluded by the Code of Professional Responsibility.

Firm No. 8. Absolutely not.

Firm No. 9. This firm has never advertised or solicited business in any way precluded by the Canons of Judicial Ethics.

Firm No. 10. The firm has never advertised nor solicited business in any ways

precluded by the Canons.

Firm No. 11. The firm has never advertised or solicited business in any ways precluded by the Canons.

Firm No. 12. The firm has never advertised or solicited business in any way precluded by the Canons.

Firm No. 13. No.

Firm No. 14. We have never advertised or solicited clients or legal work in any way precluded by the Canons of Professional Ethics or the Code of Professional Conduct.

(3) QUESTION NO. 3. What are a few concrete illustrations of uncompensated effort by you or other members of your firm for improvement of the law?

Firm No. 1. Speaking at seminars - State Board of Bar Governors - Legal Aid - Maricopa County Bar - Supreme Court Committees.

Firm No. 2. A member has been Chairman of the Mineral Section (now the Natu-



ral Resources Section) of the American Bar Association; has served on the Board of Visitors of the College of Law of Arizona State University; and has served on the Supreme Court's Committee on Examinations and Admissions.

A member has been President of both the Maricopa County Bar Association and State Bar of Arizona and has been active in the organization of continuing legal education programs on behalf of the State Bar and the Arizona Law Institute.

A member has served on the Board of Directors of the Maricopa County Legal Aid Society.

A member has served on the Board of Directors of the Maricopa County Bar Association; has served nine years on the Supreme Court's Committee on Examinations and Admissions; has been a Lawyer Delegate to the Ninth Circuit Judicial Conference (serving on the Trial Practice Committee

and presenting papers to the Conference on several occasions); has been a member of the Board of Visitors of the law colleges of the University of Arizona and of Brigham Young University; has written articles published in the California Bar Journal and in the Arizona Law Review; and has presented instruction in continuing legal education programs on the Uniform Commercial Code, the use and effect of mineral reservations in patents and deeds, and other subjects.

Other members of the firm have supervised and participated in the Maricopa County Bar Association program of presenting instruction to high school students regarding legal concepts; participated in programs to explain legal concepts to grade school students; sponsored an Explorer Post of the Boy Scouts of America to encourage boys to consider legal careers; participated in the Maricopa County Bar Associ-

ation's "Bridge the Gap" programs for recent law school graduates; and participated in other State Bar and County Bar Association activities.

(3a) Firm No. 3. Every lawyer in our office spends a considerable percentage of his time in uncompensated effort for the improvement of the law. You asked for a few concrete illustrations. A member served from 1967 to 1968 as President of The American Trial Lawyers Association. This involved close to 100% of his time for that full year and literally thousands of hours of uncompensated effort for many years prior to his taking office in many other positions which he held going back to 1957. He has also chaired and/or served on many committees of the State Bar of Arizona, the Maricopa County Bar Association, the American Bar Association, etc. Another member's service has paralleled his and, as you know, this member is currently

serving as President-Elect of The Association of Trial Lawyers of America and will spend close to 100% of his time discharging the duties of that office for the ensuing year. A member is currently serving as Chairman of one of the major committees of ATLA and has also devoted hundreds of hours to state and county bar association committee work. A member is the Immediate Past President of The Arizona Trial Lawyers Association. In short, every lawyer in our office has performed a substantial number of services to the bar, without personal compensation, and is encouraged by the firm to do so.

Firm No. 4. The writer spent approximately two years on the Criminal Justice Committee, drafting the Arizona Rules of Criminal Procedure which became effective September 1, 1973. Additionally, he worked on the following committees: Judicial Evaluation Committee; Subcommittee of the Uniform

Rules of Criminal Practice, United States District Courts, Ninth Judicial Circuit; City Rules Committee; Midas Program; and the Arizona Criminal Jury Instructions Committee.

Firm No. 5. Lawyer A: Chairman, Rules of Professional Conduct, State Bar, 20 years; Chairman for many years, Standing Committee to draft original rules and later amendments to the Rules of Disciplinary Procedure; Member, Committee on Judicial Qualifications (reviews and takes action against judges for infractions or incompetence); Board of Visitors, ASU Law Society; Board of Directors, ASU Law Society; Membership on Board of Governors and Vice President of State Bar.

Lawyer B: President and one of founders of ASU Law Society.

(3b) Lawyers C & D: Committee on Examinations and Admissions, State Bar.

Lawyer E: Local Administrative Com-

mittee; Board of Visitors, U of A; Board of Directors, U of A Law College Association; Committee on Uniform Jury Instructions; Committee for State Bar Compulsory Insurance; Maricopa County Bar Long-Range Planning Committee.

Lawyer F: Board of Visitors, Rueben Clark Law School, BYU; Ninth Circuit Judicial Council to Study Improvement in Administration of Justice.

Lawyer G: Member, Tax Advisory Council to Improve Internal Revenue Act.

Lawyer H: Co-Chairman, Fee Arbitration Committee.

Lawyer I: Years of service to the bench in devising court and judicial procedures.

Lawyer J: Committee to Study Reorganization of Justice of the Peace Courts.

Various firm members: Local Administrative Committee for processing ethical violations; Examiners to Local Administra-



tive Committees; Counsel to the State Bar on three formal appeals to the Supreme Court in admissions cases.

Firm No. 6. Concrete illustrations of uncompensated effort for improvement of the law are as follows:

(a) Active participation in the programs of the Maricopa County, State of Arizona and American Bar Associations;

(b) Representation of low-income minority people at no charge for services;

(c) Active participation in State Bar Continuing Legal Education programs;

(d) Services as Bar counsel and Chairman of State Bar Administrative Local Committees;

(e) Participation as counsel and active membership in Valley Big Brothers, maintenance of active membership in State and local Chamber of Commerce and numerous civic-oriented activities.

(3c) Firm No. 7. A few illustrations

of uncompensated effort on the part of members of our law firm for the improvement of law are as follows:

Service on numerous committees of the American Bar Association; Service on numerous committees of the State Bar of Arizona; Service on the Board of Directors and numerous committees of the Maricopa County Bar Association; Numerous articles written for legal publications; Participation in seminars conducted locally and throughout the United States; Teaching in law schools; and Testifying before numerous committees of the State Legislature on pending legislation.

Firm No. 8. One of the principal recent services performed by this firm involved our participation in that certain action entitled Ethics Opinion No. 74-28, wherein the Arizona Supreme Court did on April 9, 1975 render its decision which effectively permitted attorneys in firms

and private practice to continue to sit upon public boards and governments. A substantial number of hours was devoted to this task. Historically, all of us have served upon one or more State Bar committees and we number at least one former president of the State Bar of Arizona among our partners. Currently no less than two of our members serve upon administrative committees and give freely of their time to the furtherance of the law and the profession. Any number of other instances could be cited but they would be repetitious.

Firm No. 9. Personnel of this law firm have participated or are members of the following groups and committees:

State Bar; Maricopa County Bar;  
Public Interest Law Firm; Ethics Committee;  
Continuing Legal Education Services;  
American Judicature Society; Board of Visitors of College of Law; Committee on Admissions and Legal Education; Chairman

of Environmental Law Section of State Bar;  
Chairman of Section on Real Estate Law;  
Chairman of Medical-Legal Malpractice Panel;  
Prosecution of Ethics Violation Disciplinary Committee; and Committee to Evaluate Bar Examination.

Firm No. 10. This firm like most other major Phoenix law firms, has contributed toward improvement of the law by participation in the Bar activities at the County, State and National levels, including invaluable committee work. We have also contributed to legal publications, including law journals.

(3d) Our members have voluntarily participated in numerous legal education projects serving as panel members. The firm feels a strong sense of obligation to participate in professional societies within the various specialities of the firm members. All of such specialty groups put on continuing educational programs in which

we have participated.

The expenses of all such participation has been borne by the firm. It would be impossible for me to recount all of such professional activities, but they would number in the dozens each year. Given sufficient time to research the question, I could of course itemize them in greater detail.

Firm No. 11. The following are a few concrete illustrations of uncompensated efforts by me and other members of the firm: membership on the Civil Practice Committee of the State bar, on the Administrative Committee, on the Uniform Jury Instruction Committee, officers of the Maricopa County Bar Association, bar counsel for the Administrative Committee, etc.

Firm No. 12. Four members of this firm are active in the work of the American Law Institute. Members of the firm have been involved in the drafting and en-

actment of the recent federal disqualification of judges act, 28 U.S.C. § 455; the revisions of the Uniform Commercial Code in Arizona; the preparation of a new corporate code; and the preparation of the Uniform Landlord and Tenant Act. One member of the firm was chairman of the committee which prepared the rules of evidence now pending in the Supreme Court. Other examples are legion. Matters of this kind are recorded by the office under a general heading of public service on a computer system. The calculation for public service at our average hourly rate for our year to date (10 months) is \$234,146.

Firm No. 13. We hesitate to single anyone out because many of us are involved in these activities. Lawyers A and B have both served as president of the Maricopa County Bar and the State Bar of Arizona. Lawyer B has devoted substantial time to the work of the Supreme Court Committee on



Uniform Jury Instructions. Lawyer C has been active in work on Rules of Procedure and the Law of Defamation. Lawyer D has devoted considerable time to the enlightenment of practitioners in the tax field. Lawyer A was one of the initial trustees of the State Bar of Arizona Client Security Fund.

(3e) Firm No. 14. Our firm has provided three members of the Board of Governors of the State Bar, two of whom served as President. We have supplied two members of the Board of Directors of the County Bar, including one President. One of our members has been a member of the American Bar Association House of Delegates since 1960, has served a term on the Board of Governors and is currently the Chairman of one of its important Standing Committees and a member of the Board of Directors of the National College of the State Judiciary. Two of our members have been Chairmen of

Local Administrative Committees of the State Bar. We have had many members serving on other American, State and County Bar committees. One of our members chaired the 1967 Citizens Conference on Arizona Courts and was actively involved in the 1972 amendment to the Arizona Constitution providing for nonpartisan merit selection-retention of all state appellate court judges and of all Superior Court judges in the two most populous counties. Members of the firm have acted as speakers or panel members at continuing legal education programs for lawyers and judges.

All of the foregoing has been uncompensated.

(4) QUESTION NO. 4: What are some illustrations of charity or deliberately discounted professional services performed in your office for those unable to pay?

Firm No. 1. Prefer not to state.

Firm No. 2. We regularly advise and

represent, at reduced charges or at no charge, individuals or organizations who appear to be in need of legal services and whose situations or purposes appear to us to warrant reduction or elimination of the normal charges.

Firm No. 3. Our firm serves as Arizona counsel for the United Farm Workers on a completely pro bono basis. We also provide free legal service to many charitable and fraternal organizations in town, such as the Arizona Heart Association, the American Civil Liberties Union, the American Arbitration Association, the Phoenix Jewish Community Center, the Fraternal Order of Police, Southwest Ensemble Theatre, etc., etc. We perform deliberately discounted professional services routinely in cases in which the injuries are very serious and the collectibility limited, e.g. the very badly injured person with no funds to proceed against other than a limited

policy of liability insurance owned by the adverse party.

Firm No. 4. The writer is a member of the Lawyer's Referral Program, and to date, although he has interviewed approximately twenty people, he has never charged any of these people for consultation. Additionally, he is a member of the Court Appointed List for Indigent Defendants, which represents indigent defendants where a conflict exists with the public defender and services are performed at a drastically reduced rate.

Firm No. 5. Examples: Three to five cases at all times involving unemployed Mexican immigrants; three recent juvenile cases involving sex molestation of young girls. During the founding of a certain hospital and for twenty years thereafter we represented the hospital without charge. Arthritis Foundation, American Cancer Society and many others represented

without charge.

Ten percent of the recorded hours of all lawyers in the firm is "no charge time" and a substantial portion of this is for pro bono or charitable cases.

(4a) Firm No. 6. Illustrations of charitable or deliberately discounted professional services:

(a) Representation of low-income minority group home buyer entangled in complications of failing escrow establishment and arranging for transfer of title to homes with Receiver;

(b) Counseling of many low-income persons re workmen's compensation claims, without compensation to the firm, leading to the payment of benefits;

(c) Attending to handling of tax protest and relief from tax assessments for low-income minority home owners and attending to low-income home owner transfer between deceased person and survivor, with-

out charge.

Firm No. 7. Work performed on numerous matters referred by Legal Aid;

Work performed for underprivileged persons referred to our offices from a variety of sources;

Legal services rendered to:

Arizona Foundation for the Handicapped; St. Francis Xavier School Board; Cancer Crusade; Phoenix O.I.C.; City of Phoenix Municipal Housing Corp.; Northside Mental Health Project; Montessori School; Phoenix Symphony; Seventh Step Foundation; Inner City Food Co-op; L.D.S. Church; and Children's Theatre.

Firm No. 8. As a matter of long standing firm policy, our fee structure has been in part predicated upon the ability of a client to pay for the services rendered. Within the past year the writer has on at least two occasions performed a necessary legal service for no



charge because the client was indigent or unable to bear even a nominal fee. One of these involved the title to a modest home, the other a question of family visitation rights.

We have made no effort to detail the voluminous services of a charitable nature which have been performed for the betterment of the community by members of this firm, which range from presidency of hospital trustees to presidency of the Maricopa Chapter of the March of Dimes, and many, many others. It has been our policy and philosophy that services of such a nature are an integral part of the responsibility which our profession owes to the community.

Firm No. 9. Members of this law firm have provided the following services free of charge to those unable to pay:

Provided legal services to minorities;  
Made office space available for xeroxing  
and use of office facilities to a public

interest law firm; and renders services to Legal Aid.

Firm No. 10. From the time of its formation, it has been the policy of this firm to do pro bono work for deserving clients. We willingly participated in Legal Aid activities for many years without compensation. To my knowledge, we were never asked to provide legal services to an indigent person when we refused to do so. In recent years we have continued this policy on a less formal basis as a matter of internal decision within the firm.

I personally have been called upon within the last couple of years to provide legal services to indigent minors who have been charged as juvenile offenders. Indeed, even within the past few months I have appeared in Phoenix Traffic Court on behalf of indigent clients who could not afford to pay even the modest traffic fines

which would have been imposed had they been found guilty. I recite these two specific personal areas of pro bono work by way of example only.

I would estimate that within the last year there have been no fewer than 150 occasions when our firm has provided legal services completely free of charge and many more occasions when we have charged a reduced fee because of financial inability of the client to pay our normal fee.

Firm No. 11. The following are some illustrations of professional services performed in our office for charities: churches and church related societies.

Firm No. 12. This office for a period of years regularly manned the legal aid office on a weekly basis. Even though such intense activity has ceased, the dollar calculation of the time put into legal aid the last 10 months is \$21,736.

The office has the general run of

cases from anonymous poor persons. Illustrations in a group of spectacular cases are the service of representing Ernesto Miranda to the Supreme Court which involved a dollar outlay too great to face; and by court appointment, the representation of all prisoners at the State penitentiary at Florence in the disciplinary litigation in the Federal District Court. Our records show a total hourly loss to us of \$19,300 in this matter.

Firm No. 13. One member has served many years without compensation as Chairman of the Board of Good Samaritan Hospital, now Samaritan Health Service. Another has served as the national president of Florence Crittendon Homes. In connection with various charitable organizations which several of us have served as officers and board members, we have provided a variety of legal services without charge. We frequently provide services to

individuals without charge or at a reduced rate when they cannot make payment; frequently these individuals are employees of clients, but that is not always the case. These include services in the area of domestic relations, real property, and minor criminal matters.

Firm No. 14. We have actively participated in local legal aid efforts since 1947, including the providing of free legal services in pre-federal funding times. In addition we at all times have provided and now provide free or deliberately discounted services for persons unable to pay any fee or a regular fee.

Members of the firm also serve and over the years have served on governing boards of local tax-exempt organizations.

\* \* \* \*

DEPOSITION OF ROBERT G. BEGAM, ESQUIRE  
(Title omitted in printing)

\* \* \* \*

The Complainant was represented by its attorney John P. Frank, Esquire.

The Respondents were represented by their attorney William C. Canby, Jr., Esquire.

Also present: Van O'Steen, Esquire.

The following proceedings were had:

ROBERT G. BEGAM, ESQUIRE, being first duly sworn by the Notary, was examined and testifies as follows:

#### EXAMINATION

BY MR. FRANK:

Q. Would you state your name for the record?

A. Robert G. Begam.

Q. Are you engaged in the practice of law in (3) Phoenix, Arizona?

A. Yes.

Q. What is the name of your firm?

A. Langerman, Begam, Lewis, Leonard & Marks.

Q. How many attorneys do you have



in that firm?

A. Eleven.

Q. How long have you been engaged in the practice of law in that firm or some antecedent?

A. I was first admitted to practice in New York in 1952; admitted to practice in Arizona in 1956.

Mr. Langerman and I established our predecessor firm under the name of Langerman & Begam in 1957.

Q. Between 1957 and the present time, has the practice of your firm been heavily in the field of various torts?

A. Yes.

Q. If you have some way of calculating a percentage, in a rough, round number sense of the amount of the work in the office which is tort work, however you measure, by number of people working, by dollar volume or anything else, what is the percentage?

A. I would say by most any measure would be between 80 and 90 percent of our practice.

Q. And the torts with which you deal are negligence and products liability, I know. What else?

(4) A. The full range of civil trial practice, with a heavy concentration on automobile law; medical malpractice; products liability; railroad; air crash.

Q. Mr. Begam, are you associated with some national association of lawyers?

A. Several.

Q. Several, I assume.

If I may go straight to the point, you are associated with the American Trial Lawyers Association, I believe.

A. Yes.

Q. What are the general interests of the members of that association?

A. It's the Association of Trial Lawyers of America, and the general interests

are parallel to the interests of my firm; a heavy interest in the full range of civil tort litigation; consumer litigation; labor litigation; class action litigation; workers' compensation litigation.

Q. But basically, it's tort practice, for the most part?

A. In the broad sense of that word, yes.

Q. Approximately how many members are there of that association?

A. 25,000.

Q. Do you hold any office in the association at the (5) present time?

A. Yes. I'm currently president-elect.

Q. Nationally?

A. Yes.

Q. In connection with your affiliation with that association, have you traveled widely throughout the United States?

A. 49 of the 50 states.

Q. Which one did you miss?

A. Alaska.

Q. When are you going?

A. Next year.

Q. Have you talked to tort lawyers in all of those states at one time or another?

A. Yes.

Q. Does the association have any recommended minimum fees for its members?

A. No.

Q. Has it ever had such recommended minimum fees?

A. No.

Q. Is there any disciplinary or ethical system within your association dealing in any way whatsoever with the matter of fees, or is that left up to the individual lawyers and the practices in his own state?

A. For the most part, it would be left up to the (6) ethics administration in the individual states.

We do have an ethical standards for membership in the association, and it's

perfectly possible for one to be expelled from the association without disciplinary action being taken within the state. It would be unusual.

Disciplinary action, such as disbarment or suspension within the state would automatically result in similar action in the association.

Q. What are the ethical standards to which you have just referred for membership in the association? Is that a published document of some sort?

A. I'm not sure. I don't think so. I don't think so.

We do have a mechanism that's comparable to the sort of thing that most of the state bar associations or state bar ethics committees have, that can be triggered by a report of one member on unethical conduct of another.

With respect to fees, it would more likely be abuse of Canons of Ethics with

respect to referral fees.

Q. Mr. Begam, what is the practice of the members of your association in respect to advertising?

First, I will break that down into subunits. What is the practice of your own office in respect to advertising?

A. We don't have it.

(7) Q. Secondly, what is the practice of ATLA members in the state, so far as you know in respect to advertising?

A. So far as I know, they would adhere to whatever the standards are in their state.

It's my understanding that in some states recently there have been very limited relaxations in the prohibition of advertising in Yellow Pages and law lists, and so forth, with respect to certain specialty ratings.

New Mexico is an example, and I would assume that our New Mexico members



follow the limited standards in those states, and where there are limited standards on advertising, as they exist.

Q. That is to say by law lists and in the Yellow Pages, wherever permitted?

A. Yes.

Q. But that would be in common with all lawyers in the state; is that correct?

A. Yes.

Q. What phenomena known as -- and I quote the phrase "ambulance chasing" -- what does that phrase connote to you?

A. Soliciting cases. Direct, overt solicitation of legal business.

Q. What is the attitude of your association, either in the state or nationally, as you are able to tell me, (8) towards such practices?

A. I would say representative of the general attitude of the Bar, that is opposed to it.

Q. Have there been proposals seriously

considered in your association to recommend abandonment or major modification of advertising principals of the Canon of Ethics of the American Bar Association in most of the states?

A. If you are talking about the recent action taken by the ABA, there was an analysis of that action by the Professional Responsibility Committee of the ATLA, and that committee is in communication with the corresponding committee in the ABA on two matters.

One, we felt that the ABA pronouncements on permission of advertising were too broad, and we urged restriction of those, in the sense that it was implied, as we read it, that under certain circumstances, multi-media advertising would be endorsed, and we were opposed to that.

Secondly, with respect to the specialty lists contemplated, it was our position that to the extent there are

specialties in law lists or in Yellow Pages. One of the logical specialties would be trial practice, and we urged that they and we get together to develop a professional standard with respect to that specialty.

(9) Q. Mr. Begam --

A. I might add that most of the trial lawyers in the ABA are also our members, and what we were, in effect, saying, "Why don't you work with us on developing those standards?" And the preliminary response has been quite affirmative from the ABA.

Q. But at no time has your organization proposed that there be general abandonment of the standards of solicitation or the standard of advertising which have long existed; is that right?

A. Quite to the contrary. Our reaction to the ABA announcement was that we thought it might be drifting too far in

that direction.

Q. Now would you tell us, sir, why do you have this attitude, that the traditional standards should be firmly maintained, which I take it is your attitude?

A. My personal attitude.

Q. We can't separate your personal attitude from the attitude of the president-elect of the ATLA; can we?

A. Obviously. But I hasten to say that I am not speaking for 25,000 members or the board. I can tell my own reasoning.

Q. Would you be so good?

A. Yes. First, a matter, I guess, of dignity, not in any great abstract sense, but I have the feeling that (10) the dignity of a learned profession is seriously compromised by shopkeeper advertising. We have traditionally obtained clients through executing well our professional duties on behalf of our clients,

through development of reputation among our peers and in our community, not only through service to our clients, but through service to the public and to the community and to our country. That complex of traditions leads to our right to call ourselves a learned, independent and dignified profession. Dignified in that sense.

I have a feeling that those values are compromised by commercial advertising.

Q. From that standpoint of public interest, and not of the profession or of the professionals, but of the general public which needs legal services, do you have an opinion as to whether advertising might be of service in bringing to their attention who can offer services, prices and so on?

A. Yes, I do have an opinion.

Q. What is that opinion?

A. I think another aspect of our pro-

fessional duty is accessibility or availability of our service. I think if there is any one area in which we are susceptible to criticism, it's been our failure to deliver legal services as well as we might, particularly to certain segments of (11) the public.

I think we are in the process of trying to correct that through specialization programs, mandatory continuing legal programs, certification programs that most of the national bar associations and many of the state bar associations are examining now. If and when we ever develop those programs, then I would think it would make sense to promulgate those lists of specializations to the public. Again, in keeping with the dignified and learned profession.

I would hope, at the most, in the Yellow Pages, the way the medical profession does. At the least, in law lists



that would be circulated among other professionals. I don't think we are ready for that yet, because unlike the doctors, we have not developed widespread objective criteria for certifying specialists.

Q. From the standpoint of the public interest, Mr. Begam, take the matter of contingent fees; Would it be of advantage to the public, in your opinion, to carry newspaper advertisements to the effect that "This firm specializes in tort law; we handled 217 auto cases last year; our average recovery" was so and so much; "our percentage fees" are thus and such, and so permit some other firm, then, to put in an ad offering a slightly lesser fee, and so on; would that be a desirable thing for (12) the purpose of bringing knowledge to the public of available services, in your opinion?

A. I don't think so, no.

Q. Why not.

A. I think that to the extent that lawyers get involved in commercial advertising, what the public is most likely to learn is who is the best advertiser; not who is the best lawyer.

Q. You find something inherently misleading in the process, I take it?

A. Precisely.

Q. What?

A. Just that. I think that the advertising industry has developed to a sufficient extent so that the best ad sells the product, rather than the best product being sold.

I think there is an inherent misleading aspect to advertising professional services, particularly, when we are not selling toothpaste, which is a sort of objective product. We are selling a subjective service, that is, in a sense peculiar to our own profession. The lawyer-client relationship is a peculiar relation-

ship. You don't sell that relationship; you don't promote that relationship; you don't puff in order to obtain that relationship. That relationship develops and matures as a result of the client (13) seeking service, and, in my opinion, making the best effort he can to obtain the best lawyer for that particular job.

Q. On the basis of your travels throughout the United States; your discussions with lawyers from around America, or members of your association, have you formed an opinion as to whether substantial numbers of your organization have views substantially similar to yours on this subject?

A. I really can't say substantial, when we are talking about a 25,000 member association, Mr. Frank, because that would probably imply many, many thousands, and that would not be true.

Certainly, I think I have expressed

the views of the leadership of the association.

Q. Let me pause for a moment with the practice of tort lawyers in the State of Arizona. If young lawyers going into the practice don't advertise, how do they develop tort practices in this community?

A. I'll answer that question in a second, but let me first say that I would think the young lawyers coming into practice would be particularly disadvantaged by general commercial advertising campaigns. I would think the large firms would be substantially advantaged. A 60-man law firm would pay no more, presumably for a full (14) page ad in the "Republic" or a bulletin board on the corner of Central and Van Buren than would a sole practitioner. Obviously, the 60-man law firm could get a lot more mileage out of it, and presumably would have a greater resource to conduct heavy campaigns. I

think the young lawyers would be particularly disadvantaged.

Q. How does the young lawyer get involved going into practice in this community? What's involved?

A. I think he gets involved in community service; I think he gets involved socially. Many have gotten involved politically in the community, and he does a good job on handling the business that he gets.

Q. Have young people regularly been able to make successful starts, so that within a few years they are making reasonable livings in this branch of the work?

A. It's been my observation that there has been almost direct relationship between the competence and energy of a young man and his success. At least in this community.

Q. And are youngish lawyers of real competence successfully developing prac-

tices within a few years of their entry into the profession here in the tort field?

A. I believe so, yes.

MR. FRANK: Your witness.

(15)

# EXAMINATION

BY MR. CANBY:

Q. Mr. Begam, you said that the position of the ATLA was opposed to direct, overt solicitation.

What kind of indirect, nonovert solicitation -- maybe you wouldn't like to call it solicitation -- but could you elaborate a little bit of why you put the qualifiers in?

What kind of things would be permissible?

A. Well, I suppose if a lawyer joins a country club and lets it be known to the other members of that country club that he is a lawyer and will handle respectable



law business, that's a form of solicitation.

I think that would be about as extreme an example that I can give of what I would mean by solicitation that's not direct or overt.

Direct or overt solicitation, I would think an extreme form of that would be the ad in the newspaper that led to this particular proceedings.

Q. Now that, I assume is partly what you meant when you were describing how young lawyers start their business, they get active socially; maybe politically.

It is a problem, I suppose, of getting known, apparently; isn't it?

A. That's certainly a part of it.

(16) Q. You would accept, wouldn't you, the proposition that not all lawyers are equally competent, even though they are licensed?

A. Yes, I would.

Q. What is it about being a member of

a country club that would inform a potential client about the lawyer's competence?

A. Well, presumably the mere putting an ad in the "Arizona Republic", saying "I am a member of Phoenix --"

Q. That isn't the question. I see. I misunderstood.

A. Putting an ad in the newspaper, saying, "I'm a member of the Phoenix Country Club", would not inform the public at all of the lawyer's competence, but belonging to a club where you mix with and talk to and get to know other people; giving them an opportunity to size you up and see what kind of a guy you are; how bright you are; how articulate you are, and various other tools that a lawyer has to sell.

Q. You mentioned, also, that you felt young lawyers would be disadvantaged more than most by unrestricted, direct public advertising -- or perhaps "unrestricted" is too strong, but advertising in newspapers

of general circulation; things like that.

You said the 60-man law firm pays the same for an ad, but gets more mileage out of it. I didn't (17) understand that.

What do you mean?

A. Well, I guess the simplest example is that it seems to me that in the commercial word (sic) the advertisers that are the most successful are the ones that have the most money to spend on advertising. Most of the products that we buy are nationally advertised products. The heavily-media infested civilization that we live in has led to bigness, corporate bigness, to the point where there are only three manufacturers of automobiles, and a handful of manufacturers of cigarettes, and so forth in the United States.

I think the same could be foreseeable in the professions, if we went to large-scale multi-media commercial advertising in the professions.

Lewis & Roca, by way of an example, a big law firm in this community, could, I'm sure, along with other large law firms in the community, get pretty much a corner on all of the billboards and a pretty good upper hand on most of the effective media space. They have the resources to do it. It's expensive.

Q. That would be sort of a monopolization of media, you mean?

A. They could certainly do that.

That portion of the media that would be devoted to this kind of advertising.

(18) Q. Then, getting a corner on the media would be competitively harmful to the younger lawyer and the small one?

A. Yes. I'm not suggesting that it's restricted to think that any of those firms would, nor am I suggesting that all of the firms have the resources to buy up all of the time. What I am saying, they have the resources to compete more effectively than

the young lawyers starting out, and probably to his disadvantage. That's what I mean.

Q. It depends on what kind of clientele they are seeking to attract.

A. I don't know what kind of clientele you are seeking to attract when you put an ad in the "Arizona Republic". You are seeking to attract the 100,000 readers of the "Arizona Republic", I suppose.

Q. One of the things that appeared in the ad that's involved in this case was that the respondent firm would do a name change for a particularly set price that was advertised. Do you think there are such tremendous variations in the product of a name change, it's impossible to advertise a price and stick to it?

A. I would suspect that the answer to that is that there are so few variations, that someone seeking a name change really doesn't need a lawyer.

Q. Has anyone publicized that?

(19) A. I would hope that the State Bar in its public information program would publicize that. I would certainly urge them to.

Q. So would I.

We started this direct examination, or early in it somewhere, with something about the contingent fee. Contingent fees have been under considerable criticism in the individual case, because they seem high, at least when the recovery is substantial.

What is the justification for the percentage of the fee charged?

A. Well, I don't accept your premise.

Q. I didn't say that they were too high, I say that they have been criticized.

Do you accept that?

A. I accept that they have been criticized by certain segments of society.

Q. Right. You consider that criticism unfounded?

A. Yes, I do.



(Recess taken.)

A. (Continuing) You want my ideas of what I think whether contingent fees are bad things and/or good things?

Q. Yes, one of them.

A. Principally, the one area of the practice where there is a minimum of problem of delivery of legal (20) service is the contingent fee case. The poorest man in the community can get the best lawyer in the United States to represent him, and without the contingent fee, he can't. There is no way that he can find his way into a court. It's that simple.

To what extent in this deposition do you want to go, to turn it into a philosophical debate as to the contingent fee?

Q. Not too much. One reason the poor man can afford this, partly if it turns out he loses, at least it's not that much of a legal fee?

A. That's correct. It's more than that.

He can't afford a lawyer on the noncontingent basis, even on the minimum rates that are sometimes advertised in newspapers.

Q. Right.

A. He couldn't even afford a name change.

Q. Okay. That means, then, that a firm like yours necessarily figures that they will sometimes do a great deal of work and get no fee, in the rare occasions when you might wind up with no recovery at all?

A. Thank you.

Q. Is that correct?

A. Those rare occasions are sometimes rather crippling, and even firms that consider themselves fairly competent and experienced in this field, as I do consider (21) our firm, I can state you some pretty good examples to us: 1,200 hours spent in Ft. Smith, Arkansas, with a medical malpractice, with a big fat zero.

Q. But the fact that turns out there is no fee in the end does not affect the quality

of service that's given to the client, I assume?

A. No. Interestingly enough, the cases that result in zero fees result in the ones that the quality of service to the client was the greatest; the result wasn't so good.

Q. Mr. Begam, are you also a member of the ABA yourself?

A. Yes, I am.

Q. Have you been an officer in that?

A. No.

Q. There was some reference in your testimony to the reaction of the ATLA committee and leadership to the ABA proposal on recent advertising.

It's my understanding there were two proposals. One was the original proposal by the ABA committee. The ABA committee's proposal would have authorized general advertising in media of publications, is my understanding, and the ABA's superior body came out with a much less radical, shall

we say, proposal. Which one are you referring to when you talk about the reaction?

(22) A. I was referring to a reaction to the original committee proposal. As I understand it, it wasn't that they would authorize it directly; it is that they would authorize it if it was adopted by the various states. I think.

Q. Right.

A. In terms of our reaction -- we reacted first to the committee proposal, announcing our opposition to multi-media advertising; general circulation advertising under any circumstances at any time.

Then, the reaction to the more recent proposal related primarily to the specialization aspect of it and the designation of specialty groups and the need for designating and certifying trial specialists, and our willingness to work with them on that.

Q. You mentioned that one of the possible places in which the bar in general

could be criticized is in delivery of legal services to certain segments of the public. You didn't identify those segments. Did you have in mind a particular segment?

A. Middle class people and lower class people, in particular, and poor people; I would say now to a lesser extent than before. We are doing a better job on that than we did in the past, but not a particularly good job.

Q. Do you do any significant amount of noncontingent (23) fee practice?

A. We all do -- I would say the answer (sic) to that is yes, but do not do -- and maybe this is the thrust of your question -- a great deal of per diem or per hour work. I would say maybe 10 or 15 percent of our practice is, of our remunerative practice is that. We all do a great deal of promono (sic) work.

Q. At what point is the amount of fee made known to a client who comes into your office?

A. Well, in the first conference with the client we advise the client the basis for charging. If it's a contingent fee, the client is actually given a written contract, which we use in all of our cases.

If it's an hourly or per diem rate, we tell them what our hourly or per diem rate is and how it's counted.

They don't know what the ultimate fee is going to be, because we don't know how long it's going to take. To my knowledge, we don't do any flat fee work.

MR. CANBY: Thank you, Mr. Begam.

MR. FRANK: I have no redirect.

\* \* \* \*

DEPOSITION OF WILLIAM HELME, M.D.  
(Title omitted in printing)

\* \* \* \*

WILLIAM HELME, M.D., being first duly sworn by the Notary, was examined and testifies as follows:

MR. FRANK: Mr. Canby, I note for the record that my name is John P. Frank, and I



make an appearance in behalf of the Complainant. Would you note your appearance.

MR. CANBY: William C. Canby, Jr., and I am entering an appearance for the Respondents.

\* \* \* \* \*

# EXAMINATION

BY MR. FRANK

Q. Doctor Helme, would you please state your name for the record?

A. William Helme.

Q. What medical degrees or specialties are you associated with?

A. Well, I'm a neurosurgeon. I'm board-certified in that specialty.

I have an M.D. Degree, and I also have a Master of Science Degree in neurosurgery, from the University of Minnesota.

(5) I had my specialty training at the Mayo Clinic in Rochester, Minnesota.

I have been in private practice of neurosurgery in this community for 18 years.

Q. Doctor Helme, are you, in the first place, associated with any branches of the Medical Association which have to do with the administration of its ethical standards?

A. This year, I'm Chairman of the Professional Committee of the County Medical Society.

Q. What is that committee?

A. It is concerned with dealing with any problems that arise with respect to medical ethics or disputes or differences between physicians.

Q. Doctor Helme, in the period of your professional training and your work up to the present time, have you had occasion to become intimately acquainted with the traditions and practices of the medical profession in respect to advertising?

A. Not especially. I think I'm reasonably well-informed in that area.

My present job, as Chairman of the Professional Committee, requires that I be

well-informed.

I was President of the County Medical Society in 1970, and I suppose became involved in ethical matters (6) from time to time in that capacity.

Q. In that connection, are you yourself acquainted with the practices of the medical profession in regard to professional advertising?

A. I believe so. Yes.

Q. Would you tell us, please, what are those practices?

A. The ethical practices of the medical profession?

Q. Well, if the question is confusing, let me put it over again.

A. It is.

Q. Do you have a Canon of Ethics similar to the lawyers (sic) Canon of Ethics, with respect to the matter of advertising?

A. That narrows it down a bit.

Yes, I think.

Q. Would you tell us, please, the general substance of the ethical rules of your profession in that respect?

A. I think the most important point that should be made in that regard is that that should be made in that regard is that medical ethics are designed for the protection of the patient, rather than the physicians.

Q. I'm sorry, sir, but I want more basically that: What is the rule of the medical association in respect to advertising?

(7) A. There shouldn't be any.

Q. And this covers newspaper advertising; radio advertising; any kind of media; is that correct?

A. Yes. Now, there are exceptions. For example, a physician is permitted to announce the opening of his practice in a prescribed manner, rather simply. The announcement shouldn't go beyond stating

his name, the address of his office, his hours, and a brief curriculum vitae.

Q. We are taking this deposition in your office; isn't that correct?

A. Yes.

Q. Would you name, please, three types of service that are performed by you or other doctors in this office? Any three.

A. Three types of services?

Q. Yes. Of medical service.

For example, you are a neurosurgeon?

A. Yes, all five of us. There are our names on the door. All five of us are neurosurgeons, and we do all neurosurgical procedures, with respect to the nervous system.

If you wish me to name three --

Q. Name any three, so I can question on any.

A. We do craniotomies, which means any surgery (8) involving the opening of the head.

We also do surgical procedures on the spinal canal.

Q. Let's stop with those two.

A. All right.

Q. Let us suppose, hypothetically, that a person who is a neurosurgeon put an announcement in the paper in the form of an advertisement, simply bought the space, and said, I will perform a craniotomy for you for so and so many dollars, or I will perform a spinal tap and a spinal opening for so and so many dollars. I'll ask you to assume that happens. Would that be a violation to the Medical Canon of Ethics to which you refer?

A. Yes, sir.

Q. Would you explain, sir, whether this has been the practice for a long time in medicine, or is this some recent innovation, this kind of restriction?

A. This has been true as long as I have had any familiarity with the practice of



medicine. It's never been otherwise.

Q. So, as far as you know, this is a rule which has existed so long as doctors have practiced in this country?

A. Yes.

Q. Now, would you tell us, sir, what is the function of such a rule?

(9) Why does the profession have this rule, if you know?

A. Well, this brings me back to the answer I started to make: That our ethics are designed to protect the patient, not the doctor.

I think that there is somewhat a common misconception that these restraints are designed to protect ourselves, and that just isn't true; they are designed to protect the patient.

And you ask me about a doctor advertising his fee for a craniotomy. I smiled when you asked that question. It's ludicrous to even imagine such a thing, because

there must be more than a hundred different types of craniotomies. Each of them is a major surgical procedure, involving an almost infinite complexity of detail that couldn't possibly be specified in any such advertising, and it would appear to me that the few charlatans amongst us would be most likely to seize upon that opportunity to seduce patients and to misrepresent what they would provide, and the opportunities for doing this are just infinite.

A. Doctor, are there some procedures that are so extremely simple that there would be no real possibility of misleading? As, hypothetically, sore throats treated, \$26.50?

(10) A. No.

Q. Why not?

A. The variety is so infinite, even in that simple example that you specified, that to presume to specify in advance the fee that one would charge for this, I think,

would be a distinct disservice to the patient.

We don't treat sore throats, but there is just a vast multitude of types of sore throats of varying degrees of severity and complexity.

Q. Doctor Helme, let me go to the nature of the medical --

A. May I add, I think, one important point?

Q. I wish you would.

A. None of which is apparent to the patient. The complexities; the varieties of these conditions are completely unknown and obscure to the patient.

Q. Doctor, how does a young doctor get started in this community, in his profession?

A. By making such announcement as I described earlier; sending it to all of the other physicians in the community; by having his name listed in the Yellow Pages, and

any other directory.

There are announcements made by all the hospitals of new physicians when they are appointed to the staff. A physician attends the staff meeting and is (11) introduced.

Invariably, a hospital has a newsletter that is circulated to all physicians, and the addition of that individual is proclaimed therein.

Q. Within your observation in this community, have those devices been sufficient so that capable young doctors develop practices within two, three, four, five years here?

MR. CANBY: I don't know whether this is an objection to the form or not, but --

MR. FRANK: Make it, please, and I'll just restate it. How would you like it to be, Mr. Canby?

MR. CANBY: I don't know whether it's objection to form. It's an objection of

whether or not he has any way of determining.

MR. FRANK: Let's go to foundation. That's a good objection.

Q. BY MR. FRANK: In connection with your function as President of the Medical Association, and in other works in the association, have you had occasion to become broadly acquainted with the physicians of this community?

A. Yes.

Q. As a result of your acquaintance with those physicians, have you become enabled to form an opinion to whether young doctors manage to busy themselves at their (12) practices fairly rapidly, early?

A. Yes.

Q. What is that opinion?

A. There is never a problem.

Q. That is to say, that insofar as communication of the community is concerned, the devices you described are sufficient so

that their practices rapidly grow; is that it?

A. Yes, that's correct.

Q. Now, I'm aware that the term "rapidly" is imprecise, but do you have a round number figure for capable young doctors; how many years does it take?

A. I think it's not a matter of years; I would estimate that in a few months doctors are busy almost without exception.

Q. Doctor Helme, when a patient comes to your office, what inquiry do you make of him concerning his ability to pay for the services which he seeks here?

A. None.

Q. Isn't there someone at the desk who checks his insurance, of a sort?

A. Yes, there is, I believe. I never look at it, honestly. I have no knowledge of whether a patient is going to be able to pay his bill or not.

Q. Well, is there somebody in this



office who has (13) that knowledge?

A. I believe we have a form that we fill out that does contain that, but it has nothing to do with their subsequent care.

Q. In short, you accept the patient, if you accept him, without regard to his ability to pay; is that correct?

A. Invariably.

Q. Have you any notion of what proportion of your patients are, in fact, unable to pay the full fees which you would normally charge?

A. I really don't, but it's not very high. I would estimate that our bills are 95 percent collected, or better than 90 percent, I believe. But, on the other hand, there are often, or from time to time there are patients whose bills will be very substantial, more than 500, and nothing is collected.

Q. Doctor, do you devote any of your

time to matters related to the improvement of your profession?

A. Yes.

Q. Would you describe, please, what you do, either in regard to the substance of medicine or in regard simply to improvement of the profession, as you can conceive it?

For example, do you publish papers; do you do (14) researches?

A. More in the line of teaching.

Q. What do you do?

A. Most of our work is done at the Barrow Neurologic Institute, part of St. Joseph's Hospital, and we had 10 residents, 10 young men in training to be neurosurgeons. They spend five years as residents, and a substantial part of my time is devoted to providing that education to those young men.

Q. Are you compensated therefor?

A. No, except that you might -- no, we are not compensated, as such. They do

indeed work patients up and assist in their care.

Q. Do you regard it as part of your professional duty, as you conceive of the function of the medical profession, to engage in that kind of educational work?

A. Yes.

MR. FRANK: I have no further questions at this time.

#### EXAMINATION

BY MR. CANBY:

Q. When you described that a doctor when he opens his practice is able to briefly state his CV, and send out announcements --

(15) A. Excuse me. I didn't hear the first part.

Q. That he can give his curriculum --

A. Oh, CV.

Q. -- and announcement that he is opening his practice. To whom is that announcement made?

A. To other doctors. I probably should add to that, I believe it is proper for a physician to put such a brief notice in the newspaper.

Q. I see. The purpose of that, then, is to notify prospective patients that he is in business at that location -- in practice? I'm sorry.

A. Correct.

Q. The other announcements that you mentioned, the hospital, when an associate physician makes an announcement, is that announcement made to the public or is that made to the physicians?

A. I believe just to physicians.

Q. And other notices might be sent out within the profession; is that right?

A. Beyond the one you have described?

Q. Yes.

A. By the physician?

Q. Right.

A. No, I think that's it.

Q. Okay. I see. You mentioned that two months is (16) usually enough for a doctor to get viably established in practice, perhaps, here. Do you know any doctors, medical doctors, who have set up practice here in the last couple of years who have been unable to establish a practice?

A. No.

Q. That suggests, then, that there is so much work to be done that it's occupying basically every doctor available; is that right?

A. Yes, that suggests that, I guess.

Q. You mentioned that it would be impossible to set a fixed fee for something like a sore throat, in an advertisement, with proper regard to ethical considerations. Would it be ethical to state a fixed fee in advance for a vasectomy?

A. Would it be possible --

MR. FRANK: Pardon me. Objection,

one, foundation. I don't believe that the witness stated there could not be a fixed fee in advance in a particular case, but merely you couldn't advertise in general.

Is that a fair point, Mr. Canby?

MR. CANBY: I didn't mean to misstate your testimony. I think the question which you previously asked, and answered, was would it be proper for a medical doctor to advertise that sore throats would be treated for \$26.50.

(17) And your answer to that, I believe, was "No".

Q. BY MR. CANBY: Do I correctly state that your answer was "no", because there are different kinds of treatments which might be required for a sore throat?

A. And there is such an endless variety of sore throats.

Q. Would it be possible for a medical doctor to establish in advance and publicize the fact that he will do vasc-



tomies for a fixed fee?

A. I think that's possible. I certainly wouldn't go beyond that verb, though, that it is possible -- adjective.

Q. Are there in medical practice forms of practice in which a doctor knows in advance the particular kind of work are going to pay a flat fee, group practice arrangements, or anything like that?

A. Yes, there are some categories of services, I presume, where one could anticipate a fee that would probably cover it.

Q. If in the occasional case that fee did not cover it, couldn't the doctor simply go ahead and do the work at a loss, as it were?

A. Yes, he could.

Q. In your practice, that occasionally happens, not because you have stated a fixed fee; but because a (18) patient can't pay?

A. Yes.

Q. You mentioned that were advertising permitted, charlatans would seduce and misrepresent, I think were the terms you used?

A. Yes.

Q. In what sense, if a medical doctor were prepared to perform vasectomies for \$125, and advertised that, would that lead to seducing and misrepresenting, seducing the public and misrepresenting to them?

A. First of all, he might be incompetent relative -- I think a point that I didn't make and needs emphasis in that regard, and that is the public is totally incapable of evaluating a physician's competence. I say that without reservation.

A few years ago one of the most attractive, articulate, confident-inspiring gentleman I have ever met had his license revoked, and that's a rare occurrence in this state. He had a solid corps of patients who were willing to testify that he was the finest physician and surgeon

in the business.

Patients are totally incapable of evaluating the competence of a physician.

Q. You would say, then, that licensure is not a guarantee of competence, much as we'd like it to be?

(19) A. I would say it is not a continuing guarantee. At the time of issuance, it is a reasonable guarantee.

Q. Now, if that doctor does not advertise -- we have already established that all of the doctors are adequately busy within a couple months after being in practice -- if he does not advertise, and is busy anyway, how does his patient know that he is incompetent?

MR. FRANK: Professor Canby, I think you mispoke. Would you like your question read back?

MR. CANBY: Yes.

(Question read by reporter.)

MR. CANBY: I'll rephrase the ques-

tion. Perhaps it's not clear what I was asking.

Q. BY MR. CANBY: You said that the doctor might be incompetent, and therefore, the advertising of vasectomies at \$125 each would be dangerous to the public. If he does not advertise, and is incompetent and still gets patients, as you have said doctors here do, isn't the public equally in danger?

A. No.

Q. Why?

A. Fewer of them are in danger if he doesn't advertise.

If you don't mind, to use an example within my field of craniotomy, presumably, he who is least busy (20) will resort to the unconventional technique of advertising to enlarge his practice, and the patients will never know the physician is competent or not. He has no way to evaluate that.

Q. That is true, is it not, whether the

physician advertises or not?

A. Except that that exposure will be to fewer patients if he doesn't advertise. The inability to evaluate his competence will be a burden upon fewer people. Presumably, invariably advertising works.

Q. Advertising does increase business?

A. Yes, it does. So that the deficiency that you postulate will be imposed on fewer people if he doesn't advertise.

Q. I see. When a doctor advertises and increases the number of his patients, does that patient come from other doctors?

A. It depends --

MR. FRANK: Pardon me. Objection, for one, of foundations, since I believe the testimony would indicate that substantially no doctors advertise. In other words, the question assumes that the doctors are advertising, and therefore, that certain things happen, and I object on the grounds that that's speculative.

MR. CANBY: Do you just want me to preserve that (21) objection?

MR. FRANK: Yes. He may answer if he wishes. I'll merely preserve the objection.

If you restate the question, I will have preserved it.

Q. BY MR. CANBY: You said the advertising would be effective in the sense that it would draw patients into the advertising doctor?

A. I believe so.

Q. Are those patients who would otherwise be going to other doctors?

A. Not necessarily. It might be that the thrust of the advertising would be to persuade the patient that he needs services that he actually doesn't need. So, it might create new patients that wouldn't have otherwise existed, as such.

Q. Might it also persuade a patient that he did need services that he, in fact, needed?



A. It's possible.

Q. If a doctor performs treatment incompetently, and I would include in incompetence the performing of unnecessary treatment, are there other Canons of Ethics or ethical requirements that are violated?

A. Yes.

Q. The doctor then could be disciplined for (22) incompetent performance and/or fraudulent performance, aside from the restrictions on advertising?

A. Yes. The advertising restrictions wouldn't have anything to do with discipline for incompetent performance. That would be mainly in the area of the hospital.

Q. A couple of rather simple questions, but I think we should get it in the record: I assume that you would agree that not all doctors are of equal skill and competence.

A. I would agree with that.

Q. We can also establish probably that doctors would charge different fees for per-

forming the same medical treatment? Different doctors would?

A. Yes.

Q. How do patients generally come to realize that they need the services of a medical doctor?

A. They get sick?

Q. The start to hurt?

A. Or some other disaster befalls them.

In our specialty, the signs of difficulty are usually pretty profound and obvious.

Q. When that patient becomes aware of his need for medical services, how does he find a doctor?

A. Well, again, concerning my specialty, no patient comes to us direct. They are referred by other physicians.

(23) Q. How do they get to that physician?

Most of the people have a physician. If they don't, when they come to this community, many of them will have asked where they

were who would be recommended here; who is known.

When they arrive in a community, the method of getting in touch with a primary care physician is through the Medical Society. Calls are made there frequently.

Q. Do they have a referral service of some sort?

A. Yes.

Q. When the patient is referred by that service to a particular doctor, at what point is he made aware of the fees which may be involved?

A. For the most part, when he arrives at that physician's office, or after the service has been provided.

Q. Does he have any way of knowing what other doctors, or is he told what other doctors would be charging for the same services?

A. That is a minor consideration at this time, I believe, because the majority of

the patients have some type of insurance coverage, and there is a pretty considerable amount of uniformity among fees.

We have, for example, a fee schedule that takes up some 90 pages, and there are a great many variables (24) within that fee schedule, but there is set out therein the broad categories of fees, and a patient has access to that. The most commonly known is the "California Relative Value Schedule" that was first devised in 1954, and that's widely disseminated; is available to patients, and that is a very good indication of what fees will be.

Q. Would it be a violation of the medical profession's ethics to publish that schedule in the "Arizona Republic"?

A. I don't think so. We have an organization that was formed by the Medical Society in 1970, called the Maricopa Foundation for Medical Care. About 90 percent of the physicians belong to that, and the

members agree in advance to accept that fee for the various services, as total payment. And those fees are published, I believe. At least, we would have no objection to them being published.

Q. Would it violate the Canon of Ethics of the medical profession for an individual medical doctor to publish in the "Arizona Republic" the fact that he agrees to that schedule of fees you just mentioned in your last answer?

A. I think so. The fact is broadly known, because there is published a document that lists all of the physicians who are members of this foundation, and (25) therein it is stated that they accept the fee allowed by the foundation, as total payment.

Now, if they, in addition to that, were to publish their name, it would be evidence that they were seeking additional notoriety.

You know, we have confined our remarks

pretty much to advertising and not just publicity, which is really a very similar problem, and --

Q. We are dealing here with advertising.

A. So we don't get into the matter of publicity in this discussion, this deposition?

Q. We don't yet.

MR. FRANK: I will take it up with you on the redirect, a little later.

THE WITNESS: I don't wish to volunteer anything, but I wanted to be sure about that.

Q. BY MR. CANBY: You said that the great number of patients are covered by insurance. You don't have any rough estimate, do you? Did that come out already?

A. I haven't said so. I should know that; I don't, but it's more than half the patients have some type of insurance coverage; substantially more.

Q. In the Yellow Pages, Doctor, there is a notation after your name that your



practice is confined to neurological surgery. What purpose does that serve?

A. I don't know. I suppose -- and I have wondered about that, frankly. It might just as well have said "Neurological Surgery". "Confined to" is hardly necessary.

Q. I didn't mean to be concentrating on those particular words, but the indication that you are a neurological surgeon is inserted for what purpose?

A. I suppose so that I will not get improper calls from other physicians or from patients who are seeking a pediatrician, for example.

There is a general practitioner in Scottsdale, whose name is William Helms, and we do have cross calls from time to time, and I'm sure it would occur much more frequently if I didn't have it indicated there that I am a neurosurgeon.

Q. In other words, it's a way of ad-

vising the public that you do not take certain kinds of cases?

A. Yes, and also other physicians.

Q. And with other physicians, I suppose that it advises them that you do take certain kinds, too?

A. Yes.

Q. Is it common practice for a physician in this county to establish within his own office a fee schedule with his own bookkeeper, and then simply to check the services performed, so that the bookkeeper knows, or some (27) other service person knows how to make up the bill, and in what amounts?

A. Yes.

Q. So that he could check two or three or four different medical treatments or services that he performed, and the bookkeeper would know what to charge from that fact; is that right; because there is a preexisting schedule?

A. Yes. That isn't true of all services, but it is true of some.

Q. What kind of services?

A. Well, here in this office, for example, when a patient is first seen, and it is called a neurosurgical consultation, and there's pretty much a standard fee for that. If the problem is simple, we reduce it below the usual fee, and we will specify to the bookkeeper that that is being done. In a child, it might be less. I don't know what it is. I really don't, what we charge for consultation. I can find out very quickly.

Yes, there is a slip that accompanies the patient, and we do indicate on there the type of service that is provided.

The same is true of follow-up visits, a patient who has had surgery, and comes in for a period of time to be sure that all is well, yes, there is a standard fee for that service.

Q. You don't even have to know what that is, except when you review the schedule?

A. I don't know, so that is true.

MR. CANBY: I don't have any further questions.

#### EXAMINATION

BY MR. FRANK:

Q. Doctor Helme, I advise you as simply foundation for my question that in the legal profession there is a general prohibition on advertising, which, in turn, is part of a larger prohibition on something called solicitation. So that any ways of reaching out to get business, for example, by going house to house and asking for it and calling up strangers and saying, "Would you bring your law business to me", it would be regarded a piece of the law business for this purpose. I would be regarded as solicitation.

My question of you is: As a matter of medical ethics, are there prohibitions

upon the solicitation in the large, as distinguished from simply newspaper advertising?

A. Yes, there are.

Q. Would you explain, please, what that prohibition is?

(29) A. Such solicitation is prohibited.

Q. What is regarded as solicitation for medical purposes?

A. The things you have just described for attorneys would apply, also, to physicians.

Q. Well now, do you place any limitations upon the seeking of self-laudatory publicity?

A. Yes, indeed.

Q. Is that part of solicitation?

A. Yes, it is.

Q. What are your rules in that regard?

A. That's prohibited.

There is an example in the current

issue of "People" magazine. There is an article in there about a neurosurgeon, and there are some statements like -- it's written, obviously, by a non-medical person, by a reporter -- it includes that "75 percent of all patients with tremor and movement disorders have had their symptoms cured without complication."

There is another statement this neurosurgeon is better than the rest of us, attributed to some unknown surgery.

The cousin of one of our nurses was taken to New York twice by his family, in the last few months, and had a rather exotic unestablished surgical procedure done (30) because he has -- he is spastic, in the common terminology, from a birth injury -- even having access to reliable information with respect to neurosurgery, this cousin of our nurse went to New York twice, at great expense; had the surgical procedure which is described in "People" magazine.



He is no better, and his family are many thousands of dollars poorer. This is what concerns us.

Earlier I said to Professor Canby, and I said it twice, because I thought it was so important, that patients cannot evaluate the competence of physicians, and this type of non-scientific emotional reporting is so disillusioning. People mortgage the farm and --

MR. CANBY: Excuse me. Could I have you restate the question, again?

MR. FRANK Yes.

Q. BY MR. FRANK: My question is: How does -- in your opinion, from your experience and from your observation, how does the practice of solicitation in the medical profession affect the health and welfare of the general public?

MR. CANBY: That's a new question; is that right?

MR. FRANK: Well, it is a question

meant to get behind the answer he is just giving, so that the answer may continue.

(31) MR. CANBY: All right.

Q. BY MR. FRANK: Would you continue, sir?

A. The average person, being able to evaluate the material in that article is seduced to obtain funds by whatever means to go there to be relieved of this intolerable problem that he has.

A few years ago a Canadian surgeon a man of some prominence, said that he could sew the spinal cord back together. An absolute ludicrous statement; totally impossible.

This information was circulated throughout the world, and because it appeals to people and to newspaper reporters, who are equally ignorant in medical manners -- and I say that without criticism -- patients who are desperate for help go to this man to have this done.

He can't do it. It's a totally impossible procedure. And this is why we undertake to control such irresponsible statements.

Q. Now, let me ask you several concluding questions.

Do you have an opinion as to whether solicitation, in general, or advertising, in particular, would serve the public interest in your profession?

Do you have an opinion?

A. Yes, I do.

Q. What is your opinion?

(32) A. I believe that it would serve the public most adversely.

Q. Do you have an opinion as to whether to allow advertising and solicitation would lead to what are commonly called rip-offs, fraud and taking advantage? Would it, in your opinion?

A. I believe it would lead to such events as that.

Q. What, in your opinion, would it do to the standing of the profession, in the sense of the respect which it has held?

A. It would destroy us.

MR. FRANK: That's all I have.

# EXAMINATION

BY MR. CANBY:

Q. Doctor, you mentioned that this well-known practitioner said that he could sew up the spinal cord. In plain commercial terms, that's false advertising; isn't it, as you described it?

A. He didn't advertise this. Newspaper people picked it up and amplified it and disseminated it. I think he did say that. Maybe he had become senile. I don't know.

I'm sure you would wonder why wouldn't he be (33) contained by his local profession. I can't answer that. He was, in due course, but by then it was too late.

Q. For some patients?

A. Yes.

Q. If he had advertised this, it would be false advertising? It's an impossible operation; isn't that correct?

A. I'm sure the advertising would be so worded and distorted it might not be technically false.

He could sew it. It might not do any good. It wouldn't do any good, but he could sew it together .

Q. You did say he was finally expelled for incompetence, or like this?

A. I don't have the details on this, but he was dealt with appropriately, I'm sure.

\* \* \* \*

DEPOSITION OF MARK I. HARRISON, ESQUIRE  
(Title omitted in printing)

\* \* \* \*

The Complainant was represented by its attorney John P. Frank, Esquire.

The Respondents were represented by

their attorney William C. Canby, Jr., Esquire.

Also present: Van O'Steen, Co-Respondent.

The following proceedings were had:

# EXAMINATION

BY MR. CANBY:

Q. Why don't you just give your name and your office at the Bar?

A. My name is Mark Harrison. I am currently president of the State Bar of Arizona.

Q. How long have you been in practice here, Mark?

A. Since I was admitted, in May of 1961.

Q. As president of the State Bar you have some role in the initiation of their disciplinary proceedings; don't you?

A. Not really in the initiation of it.

The Board of Governors has the power under Supreme Court rules to initiate dis-



cipline by filing a Complaint with the Local Administrative Committee, and as (5) any member of the Board can bring a prospective complaint to the attention of the Board, and refer it for discipline.

Q. What was the route of bringing in this case? Was it your --

A. It was initiated at my instance.

Q. The State Bar of Arizona is an integrated bar, of course, and you have to be a member to practice; right?

A. Correct.

Q. As a member of the State Bar, have you become familiar with many of the practices, in very general terms, of many of the lawyers in Arizona?

A. I think I have a general familiarity with that.

Q. You are, of course, in active practice yourself; is that right?

A. Yes.

Q. To the extent that your Bar duties

permit?

A. Correct.

\* \* \* \*

(9) Q. BY MR. CANBY: Mr. Harrison, do you know the source, the drafting source of the present rule against advertising with which the Respondents are charged in this case?

A. Yes.

Q. What is that?

A. The Supreme Court of Arizona.

Q. Does it bear any similarity to the Code of Professional Responsibilities proposed by the American Bar Association?

A. I believe it does.

Q. Would you say that the similarity is exact?

A. I believe it is.

MR. FRANK: Objection. I ask leave to advise my client that it isn't exact.

MR. CANBY: That it is?

MR. FRANK: No, it is not. I believe

the language is different.

THE WITNESS: Excuse me. You are talking about the (10) discrepancies between the rule, as amended in Philadelphia?

MR. FRANK: No.

Could we go off the record?

(Discussion off the record.)

Q. BY MR. CANBY: Mr. Harrison, with the exception of minor changes in wording, the substance, at least, of the present Supreme Court rule and the American Bar Association Code of Professional Responsibility provision regarding advertising is the same; is that correct?

A. I have recently come to understand that there is a slight discrepancy between the wording of the Code provision, as drafted by the House of Delegates of the ABA and as governed by the Supreme Court which does not change the substance of the rule.

Q. Do you know which draft arose first?

A. Well, I assume -- I don't know for

certain -- I can only assume that in the normal course of events, changes in the rules are initially proposed by the House of Delegates.

They have no effect on attorneys until and unless they are thereafter adopted by the disciplinary authority in each state. So I assume it was proposed initially by the House of Delegates, then if there is a discrepancy, it was adopted in its changed form by the Supreme Court of (11) the state

Q. You are a member of the House of Delegates now; is that correct?

A. No.

Q. You are not.

What is the system of representation of the State Bar in the American Bar Association?

A. For the most part, it is based upon the number of lawyers in the state who are members of the American Bar Association. I think that for each 1,000 members, you are

-- I'm not exactly sure of the number for qualification, but I think that's the basic formula. You have to have a certain number of members in the ABA in the state to qualify for a delegate.

In addition to that, you are entitled -- I can tell you who our representatives are. We have what is called a state bar delegate. We have a state delegate who is elected by ballot among all of the ABA members of the state; the state bar delegate being appointed by the Board of Governors, then there is a delegate representing the Arizona Bar Association.

Q. As far as you know, the State Bar of Arizona has always been represented in the American Bar Association since its inception; since you have been familiar with it?

A. Since I have been familiar with it, yes.

(12) And that's since you came to

enter practice in Arizona?

A. Yes.

Q. Do you have any knowledge whether the State Bar of Arizona or the Maricopa County Bar Association ever had a suggested schedule of minimum fees?

A. I know that the Maricopa County Bar Association had such a schedule.

To my knowledge, the State Bar has never had such a schedule.

Q. Does the Maricopa County Bar Association presently have such a schedule?

A. No.

Q. Do you know approximately when it was abandoned or rescinded?

A. Within the past two or three years.

Q. The State Bar has an Ethics Committee; is that correct?

A. Yes.

Q. What's the role of the Ethics Committee?

A. In general terms, the Ethics Com-



mittee receives inquiries from members of the Bar as to whether certain hypothetical prospective conduct, if carried out, would be in violation of the Code of Professional Responsibility. The committee receives such inquiries and distributes or (13) promulgates opinions concerning the hypothetical prospective conduct.

Q. And that body is not itself a disciplinary body, in terms of initiating or hearing disciplinary cases; is that correct?

A. Yes.

Q. What force and effect, if any, do its opinions have in disciplinary proceedings?

A. I think they are generally regarded as advisory.

Q. The enforcement, then, of the Canons of Ethics, which preceded the Code of Professional Responsibility, and the Code of Professional Responsibility lies, in the first instance, with the Adminis-

trative Committee; is that correct?

A. Yes.

Q. The Administrative Committee, to which the Respondents' case has been referred has as its chairman, Phil von Ammon, and as its members, Ivan Robinette and Carl Divelbiss. Do you know these gentlemen?

A. Yes.

Q. Are they in private practice in the City of Phoenix?

A. Yes.

Q. To your knowledge, has the Supreme Court itself, on its own motion, initiated disciplinary proceedings (14) without going through -- in other words, you described the normal method as someone calling it to the attention of the Board of Governors. Has the court, without going through the State Bar machinery, ever disciplined an attorney for an ethical violation?

A. Before I answer that question, let

me correct what I think may be a misconception. The normal method is not having someone referred to the Board of Governors. The normal method is by having someone referred to the staff people in the State Bar office, who under the present rules then review, then therein refer to a Local Administrative Committee for investigation.

The rule also permits either the Court or the Board of Governors or a Local Administrative Committee to initiate complaints on their motion.

In the case you inquired about, in the earlier part of the deposition, that case was initiated on motion to the Board of Governors.

Q. Which case are you referring to?

A. The case in which you are involved.

Q. The case involving the Respondents?

A. The case of Bates and O'Steen.

Now, as far as the question you originally addressed to me about the court, I

feel confident, on certain rare occasions.

(15) Q. The question was, if you will excuse me, was: Whether you knew of any instance where the court had?

A. I only have a vague recollection of one instance that comes to mind, and it arose in the context of a litigated case came to the court, in which the court then, in its opinion, suggested that the matter be pursued by a Local Administrative Committee.

Q. By a Local Administrative Committee?

A. I don't know whether they actually used that term, but they made some reference in the opinion which raised the question as to whether the Bar should take action.

I'm kind of vague about that, really.

Q. Why was the schedule of minimum fees of the Maricopa County Bar Association abandoned? Do you know?

A. Not of my own personal knowledge. I wasn't on the Board at the time.

Q. You were a member of the County Bar Association?

A. Yes.

Q. Are you familiar, in a general way, with the traditional ethical position of the Bar in regard to advertising?

THE WITNESS: I'm sorry. Would you read the question?

(Question read by reporter.)

(16) A. I think so.

Q. What is their tradition regarding general public advertising?

A. I think the rationale underlying the so-called traditional position --

Q. Just, first, what is the traditional position?

A. It's opposed to advertising?

Q. Now, why?

A. Well, I think the principal reason for the opposition is that advertising implies solicitation, and solicitation is contrary to the normal way in which profes-

sional people, as opposed to business people secure clients, as opposed to customers.

Q. And the reason for this, then, is that the professions themselves traditionally do not solicit?

A. I think that's true.

Q. Do you wish to offer any other reasons for the tradition than the fact that it has always been that way with the professions?

A. I think that I can offer a few. At least, I can elaborate a little bit about it.

I think, historically, most people believe that the, quote: "learned professions", unquote, had an obligation or tradition of public service, and depended for their livelihood on their qualifications; on their (17) record of public service, and their ability to do high-quality work, and that these characteristics were what developed or enabled the professional to



develop a clientele or a following, and that advertising is inconsistent with those characteristics as the qualities which attract a clientele.

Advertising would enable a professional to attract a clientele without regard to his qualifications; without regard to his sense of professional responsibility, and in a general way would commercialize and change the whole focus from one who has certain strong ties with professional traditions to one who simply is marketing widgets or any other commercial (sic) commodity.

Q. And it's your feeling, then, that advertising would draw in clients just by reason of the advertisement; is that correct?

A. I don't know whether it would or it wouldn't, but I think that's obviously the rationale which those who want to advertise rely on. I think people who

want to advertise believe that advertising would attract people.

Q. And it has to attract people for it to be any danger to the people; doesn't it, the danger that you just described, that people would come in, not being attracted by the particular qualifications of the attorney.

(18) That danger is only realized if the advertising does, in fact, attract clients; is that correct?

MR. FRANK: Objection.

A. In part. In part. I mean, if people are attracted to people who aren't qualified that render service, that certainly is part of the danger for those who are attracted.

Q. BY MR. CANBY: What means now is there for a person who lives here in Phoenix, let's say, and decides he wants a lawyer, to find one?

A. Well, I suppose there are several.

He can contact the County Bar Association, which has operated a Lawyer Referral Service for many, many years, and will be advised that there are two plans within the Referral Service: Those for people who are able to afford a lawyer at whatever the competitive rate is, and those people who are of limited means. There is a panel of lawyers within the Referral Service program who have agreed to serve people of limited means.

There is a Legal Aid Society, which is available, and which is listed in the phone book.

There are all of the historic bases for referral that any professional has, a banker, a grocer, a tradesman; anybody who the average citizen might have contact with who might have had contact with a lawyer, as (19) a potential advisor, as to whether is a lawyer around to serve the potential client's needs.

Q. Let's take the Lawyer Referral Service. What happens when a person calls the Lawyer Referral Service at the County Bar? What is the next step, assuming it's someone who does not qualify for legal aid? In other words, someone who doesn't fall into the poverty category.

A. I believe the staff person makes an inquiry about the nature of the prospective client's problem. The staff person has a list of all of the lawyers who have agreed to participate in the Referral Service, with an indication to what areas of the law those lawyers are interested in serving clients.

The staff person then makes an appointment for the prospective client with a lawyer on the list. The purpose of that appointment is an initial consultation, which is then arranged.

The client sees the lawyer. If the lawyer feels that the client has a prob-

lem which the lawyer can help solve, they make whatever arrangements they are going to make, and that's how the relationship is established.

That's my understanding.

Q. Would you agree that not all lawyers are equally competent?

A. Yes.

(20) Q. And that not all lawyers charge the same fee for the same service?

A. Yes.

Q. When the person is referred by the Lawyer Referral Service to a particular attorney, what way does he have of judging either the competence of that attorney, compared to others who might have been available, or the fees of that attorney, compared to the fees of others who would have been available?

Is he told anything in that regard?

A. By the staff person?

Q. Yes.

A. I don't know.

Q. Is the staff person authorized to decide which attorneys are the most competent on the Lawyer Referral List?

A. I doubt the staff person has any way of knowing that.

Q. The staff person is not a lawyer; is that probable; or do you know?

A. That's probable.

Q. Do you feel that non-lawyers are in a difficult position to evaluate the competence of lawyers?

A. I think the question is too broad. I think some laymen are probably well-qualified to judge the competence (21) of lawyers, and some laymen are not.

Q. Are you familiar with the operation of any prepaid legal services schemes existing in Arizona?

A. Generally, yes.

Q. Is the client able to obtain legal services there for a fixed cost to the



client?

A. Well --

Q. Maybe you can elaborate and describe it.

A. To my knowledge, there are several prepaid legal services plans. There is one Bar-sponsored prepaid legal services plan commonly referred to as an Open Panel Plan. There are several Closed Panel Plans.

With regard to the Bar-sponsored Open Panel Plan, the client can obtain the services which are included in the schedule of services at a predetermined fee.

Q. That schedule of services lists various kinds of services, not necessarily by any means all, but certain kinds of services for which a certain fee will be charged; is that right?

A. That is correct.

Q. And that's made known to the potential client in advance; is that correct?

A. Yes. I think the document which

describes the plan is probably the best evidence of the plan, and I may not be entirely accurate in my statement, but if you (22) wanted to be certain you could simply secure it.

MR. FRANK: I have interposed no objection, because Mr. Canby and I have agreed that we are going to essentially allow each other that he can put in whatever evidence he wishes, but I would stipulate that if he wants to add to your deposition the documents he referred to, there will be no objection to him.

MR. CANBY: All right, I have no further questions.

#### EXAMINATION

BY MR. FRANK:

Q. Mr. Harrison, you made some references to recommended minimum fee schedules of the County Bar, which have been abandoned in recent years. Do you recall that part of your interrogation?

A. Yes.

Q. So far as you know, have there ever been any mandatory fee schedules of the County Bar?

A. To my knowledge, there has never been a mandatory fee schedule.

Q. As far as you know, have there been any disciplinary proceedings in the past, involving the question of the price of which someone puts on legal services?

A. It is my understanding that there has never been (23) a disciplinary action taken because of a fee charged by a lawyer in the State of Arizona.

Q. You have been referring to the County Bar, which maintained that schedule. Is the County Bar a part of the State Bar, or is it a separate organization?

A. Wholly separate. It's a voluntary Bar association.

Q. Your State Bar, as you have described it, is mandatory, and the County is

wholly voluntary?

A. Yes.

Q. And there is no automatic membership of one in the other?

A. Correct.

Q. Mr. Harrison, you referred to solicitation, and alluded to advertising as a portion of solicitation, I believe. Is that correct?

A. Yes.

Q. Speaking broadly, what is solicitation, as lawyers speak of it in connection with legal ethical concessions?

A. As I understand it, it's the overt, unrestrained public effort to acquire clientele.

Q. You said "overt, unrestrained". Is the "unrestrained" a necessary portion of that definition?

A. Not really.

(24) Q. What is the Bar's view on solicitation?

A. It is quite opposed to solicitation.

Q. If the Bar opposes solicitation, and if, in fact, solicitation is not carried on -- and I take it it is not in this community, generally speaking; is that right?

A. Generally speaking, it is not. I'm sure there are abuses.

Q. But, in that case, how do law offices generally grow and develop in the community.

A. I think that law offices generally grow and develop on the basis of their performance; on the basis of the circle of acquaintances, friends; business associations developed by lawyers in the normal course of their dealing in the community; by their public service activities; by their social activities.

I think that's the way most firms grow and develop.

Q. Do, in fact, law offices in the State of Arizona grow and develop?

A. Yes.

Q. Are you generally acquainted with the lawyers of all ages throughout the state?

A. I think fairly well so.

Q. In this connection, have you formed an opinion as to whether lawyers, generally speaking, who seem to you to (25) be of any real competence, in fact, are successfully developing practices within a few years of their entry into the profession here?

A. It's my impression that any lawyer of average or better than average competence, who is willing to make an effort, is developing a sustaining, successful practice.

Q. How many lawyers are there in the State of Arizona?

A. The active membership at the present time is just under 4,000. The total membership is about 4,650 members.

Q. Do you happen to know what the growth figures are in recent years?



Is there any comparison that you are able to make?

A. Well, I think since I arrived here in 1960, the Bar has more than doubled.

Q. I believe you have just told us that this 4,000 or so persons are, in fact, engaged in the practice of law, with reasonable success, if they are of any competence, without having used devices of solicitation or advertising; is that correct?

A. That's my impression.

Q. Well, now, is there, in fact, an unmet need in the community for legal services, on the part of the public?

(26) A. I think there is.

Q. What is that unmet need?

Would you describe it?

A. I think there are probably a fair number of people who have legal problems who are not having them attended to.

Q. What has your administration done, if anything, while you have been in the

leadership of the State Bar to deal with that problem?

A. We are in the process of implementing the Group Prepaid Legal Service Plan, which I was asked about on cross-examination. We have attempted to promote the concept of public interest law.

There is a committee right now which is exploring the ways in which the legal clinic concept can be properly developed.

I think those are the areas in which the State Bar has functioned primarily to meet the unmet needs of potential clients.

Q. You also mentioned earlier there is also a Legal Aid program in the state. Is that a program to be encouraged by the County Bar?

A. Yes, the Legal Aid and prepaid plan services are primarily sponsored by the County Bar Association.

Q. You were asked questions earlier about the Bar's (27) view on advertising.

What, in your opinion, is the evil of advertising of professional services, in this profession?

A. Well, there's already been a fair amount of discussion about solicitation as an evil generated by advertising. I think the advertising of legal services can be inherently misleading to an uninformed potential client.

Q. How is that so?

How is advertising likely to be misleading in this field -- correction -- I want to put this question with great care, because I suspect this part of the record will be used elsewhere.

You said advertising can be misleading; that is, advertising of legal services.

Do you regard it as likely to be misleading?

A. Yes, I do.

Q. Why?

A. Well, while I am certain that

there are certain tasks undertaken by lawyers which turn out to be essentially repetitive, it is difficult, if not impossible in advance to know whether a prospective client's problem is going to be like the last client's problem. I think if you advertise your ability to serve a prospective clientele by the rendition of services to solve certain kind of (28) categorical problems for a certain price, the advertisement in and of itself assumes that the problems are going to be the same, and that you will be able to render a quality service at a predetermined price.

Now, all I can say is that that assumption is contrary to my experience, because while as I say there are obviously cases which bear striking similarities, and services which bear certain similarities, that's something you can't know in advance, and each case -- almost every case presents distinct and major wrinkles -- they may be

major or minor wrinkles -- and to the extent they may be major wrinkles, they may affect whatever you may charge to the client.

Q. Let me ask, have you done any services in the field of domestic relations?

A. Yes, I have.

Q. Can someone advertise consent divorces, so and so much, without misleading anyone?

A. I think it's thwart with problems.

Q. Why?

A. I suppose you can get lucky and have three clients come in in response to such an ad who have no children; no real property; no real disagreement, and you can handle such an uncontested divorce, and do a proper job for a predetermined, (sic) prestated price.

(29) On the other hand, I think the odds are just as great that the prospective client comes in, and even though there is no real disagreement with the prospective

client, suppose you find that the prospective client was married before; that there are children of two marriages, and that there is real property in three jurisdictions, and even though there is no disagreement on how this property and custody should be dealt with, this requires greater effort to solve properly and competently.

I don't think the lawyer who says, I will do this for the predetermined price, is going to be able to deliver the same quality service, and if he is trying to do this, and competently handle all of the unforeseen special problems attendant to that particular client's situation.

In short, what I'm saying is that it seems to me that the inherent vices that you can't know in advance, what special problems the client who sees the advertisement will present, and if you are bound to a predetermined price, it seems to me that sooner or later you are going to have



to inevitably sacrifice the quality of service you are able to render.

Q. Can't you, instead, snake them in your announced price, then put in some add-ons, like the auto dealers?

A. That's obviously the logical consequence, and (30) what probably might make it inherently difficult. Either the client is mislead, (sic) that he is going to get a quality service and ultimately doesn't get that because of the lawyer's inability to deliver it, or he gets in and thinks it was an uncontested divorce, and finds there are problems, which in the lawyer's definition of an uncontested divorce. Then he is going to charge more.

It's like the telephone company. It's going to sell you a telephone; it's the Princess phone, and by the time you are through it's three or four different things.

I think those add-ons are what

the average lawyer deals with after he hears all of the facts, and then he can quote a fee that's going to fit for the particular problem he is going to handle, to deal with those situations.

Q. Do you believe that legal advertising would serve the public interest?

A. I certainly don't believe at this point in time that price advertising would serve the public interest.

Q. Do you think it would disserve the public interest?

A. I think it would.

Q. Why? Anything to add to what you have already said?

A. Only kind of a generalized observation. I think (31) that to the extent that if we assume hypothetically that price advertising is going to generate a lot of business for those offices which engage in it, to the

extent that my assumptions are correct, mainly, that the laweyr who engages in set price advertising is unable to deliver a quality service, or has to revise the prestated price because of facts presented by the client's particular problem. Either of these things, it seems to me, are going to lead to further disenchantment on the part of the public, and further disillusionment with lawyers in general.

Now, that's the disservice to the public from the public's point of view. There is a whole other dimension from the Bar's point of view, which also has some impact on the public.

Q. What is that?

A. One of my deep concerns about this problem relates to the ability of the Bar to deal with whatever deception arises, intentional or otherwise, in the area of advertising.

Q. Let me take you into that subject, please. How does the Bar handle disciplinary matters?

You opened that topic a little with Mr. Canby. Would you enlarge on it now, and describe it?

A. Well, the routine complaint is brought to the (32) attention of the staff people in the Bar offices, by a disgruntled client; by a lawyer or a judge; by the Board of Governors, upon reading of something in the newspaper or hearing in some other way, by the Local Administrative Committee.

It is then, in almost every case referred to the Local Administrative Committee for attention. The Local Administrative Committee appoints someone who is called Bar counsel, to actually handle the investigation and serve as counsel for the Bar in the proceedings. The function to is com-

parable to that of a state attorney, or whatever.

The Bar counsel investigates; reports to the Local Administrative Committee, and, in effect, the Committee then makes a determination as to whether or not there is probable cause to believe that a violation of the Code of Professional Responsibility has been committed. If the Committee makes such a determination, then the Committee directs Bar counsel to prepare what is called a Formal Complaint, a written document which is then served upon the Respondent's attorney, and at that point in time all of the procedural safeguards, rights to due process and so forth are invokable by the Respondent's attorney.

The hearing is held. The Respondent is entitled to cross-examine witnesses; present evidence; have (33) transcript of the proceedings; confront

-- in cases where the charge is based upon someone's allegation, confront his accuser, and so forth.

The Committee then considers the evidence and makes a determination as to whether or not the charges alleged in the Formal Complaint have been established. If they so find, they then make Findings and a Recommendation of Discipline to the Board of Governors.

If they find that it has not been sustained, they recommend dismissal.

In either event, the matter can be considered by the Board of Governors. The Board of Governors, at that level -- the Respondent and his counsel and Bar counsel appear before the Board of Governors. It's not really a de novo proceedings, because at that level the Board is going on the record established at the Local Administrative Committee, but the Board will hear any-



thing that the Respondent cares to say at that point, either in litigation or in other way bearing upon the record established at the Local Administrative Committee.

The Board can then simply affirm the Findings and Recommendations of the Local Administrative Committee; modify them; reverse with directions or further investigation, or whatever.

If the Board of Governors affirms it, then it (34) makes a Recommendations and Findings to the Supreme Court, and at that level the Respondent and his counsel have opportunity to object to the Findings; appear before the court and make argument, and so forth.

The court, of course, is the final repository of discipline authority in the state.

Q. And the court is the only one which can actually impose a discipline;

is that correct?

A. That's correct.

Q. Now, the activities which you are describing only rarely happen in matters of advertising, I assume. Is that correct?

A. Very rarely.

Q. As a matter of fact, this episode is the first case of outright advertising you have ever seen?

A. That is true.

Q. Let's go to what those other cases are. A number of those cases involve, I believe, outright charges of crime, fraud or very serious injury to persons; isn't that so?

A. True.

Q. Stealing their money?

A. True.

Q. Or in otherwise taking advantage of them, which may overlap with actual criminal offenses?

(35) A. True.

Q. Now, quantitatively, how many of the cases are there, all told?

A. Well --

Q. I asked you to be prepared on this, and you probably have some facts but to facilitate the matter, will you tell, if you have them, what the volume of these matters is, and what the time factors are that go into their handling?

A. I'll do my best.

In 1975, there were 330 Complaints docketed. As of January 6, 1976, 215 were still pending.

There are 40 Local Administrative Committees in the state, plus four special committees assigned for one Complaint only.

A review of the reports show that hearings on approximately 30 matters were held during 1975, and that an additional five matters were resolved

by stipulation. This means that that's the approximate number of matters which went to the Supreme Court, although, there were some additional matters sent early in 1976. A fair percentage was dismissed after investigation.

I should have added in explaining the disciplinary process, that all of the members of the Local Administrative Committee are lawyers who are volunteering (36) their time.

Q. On that score, the whole thing is voluntary; isn't it?

A. Right.

Q. The Board of Governors is uncompensated?

A. That is true.

Q. And the local operations is an operation carried on by busy people; is that right?

A. With minor exceptions. After January 1, 1975, we added a full-time

staff Bar counsel, whose primary responsibility is to oversee the disciplinary process, and to make sure the volunteers are doing their job. He also has actively served as Bar counsel in a limited number of matters. I think seven or eight matters last year.

We have an investigator on the staff, who investigates a limited number of Complaints which are filed.

Of course, there are some secretarial and clerical personnel in the Bar office, whose sole responsibility is in the disciplinary area, but beyond those exceptions the entire process is voluntary.

Q. Mr. Harrison, how long does it take to move these cases, generally speaking?

A. The best answer I can give you, I looked at what we call the Disciplinary Coordinator's Report, and it was (37)

produced in February, and although the report itself is confidential, on February 2, 1976, there were Complaints pending for six months or longer, 87.

Q. Is it true, Mr. Harrison, that a fairly sluggish nature of the whole process is a matter of great concern to the Bar and the public?

A. It is. I think, as far as I'm concerned, that is the most serious facing the Bar. One of the most serious.

Q. Now, this is in real part, I assume, a factor of the work volume that has to be handled; is that right or wrong?

A. That's right.

Q. Now, we come to the matter of advertising. Let us suppose that the Bar undertakes, by the use of these procedures, to review widespread advertisements in the newspapers as to whether they are misleading or not. Can we handle that, under the existing system



and with the existing machinery, at all?

A. I think not.

Q. Is the practice effectively to be that we will, in truth, have no control whatsoever?

A. I think, quite frankly, the system is -- I won't say on the verge of breaking down right now, but it is certainly strained beyond its reasonable capacity, and if (38) we try to superimpose on the existing system either a review by the bar in some way of advertising, or a response by the Bar to the unrealized expectations of those clients who relied on advertising to advertising, the system as it is presently constituted couldn't handle it.

Q. Isn't it true that the greatest single deception that could arise in the whole business would be to hold out to the public whether, in fact, we had

any control over whether an ad was misleading or not?

A. That would certainly be one of the greater deceptions.

Q. Mr. Harrison, I'd like to go to one of the other subjects, and that is concept of the profession as a public calling to which you made a reference, and here I'll narrow it down to this office and you, and the people you know best, your own partners.

What does this office, in fact, do either to improve the corpus of law or to improve the profession, as you envision either of those things?

A. Well, in terms of improving the corpus of the law, as you put it, all of my partners and I have served on various sections and committees which deal with substantive -- which deal with improvement in the substantive areas of the law.

(39) My partner, Buzz Singer, has been chairman of the taxation section; my partner Bob Myers was for many years the chairman of the uniform juries. I have been for many years on the Appellate Rules Committee. We encourage our associates to get involved in that sort of thing.

Q. Are those substantially time-consuming?

A. Quite.

Q. How about the matter of the profession itself? Take, for example, your work earlier as County Bar President -- if that's the proper title for the county -- and now State Bar President, what fraction of your time do you give to these activities?

A. Well, there's no comparison between the two, but this year I would say I am spending about two-thirds to three-quarters of my normal time on

Bar-related matters.

Q. So that, in fact, as a matter of income, you are sustained by the efforts of your partners of this year? It's become a leave of absence, as a practical fact?

A. I hope I'm sustained by my partners.

Q. Now, let me go to the matter of free work or discounted work, which may be undertaken by this office, not as a matter of simply the accident of somebody not paying, but by design and policy. What do you do?

A. Well, for two years I served as uncompensated (40) counsel for the state Democratic party. I have been cooperating counsel for the ACLU for many years, and although I haven't handled any cases for the last two years, because of my increasing activities with the Bar, I have handled

cases for the ACLU.

This office undertook to serve as counsel for the Metropolitan Resource Business Center, which is an ongoing institution in Phoenix designed to help low-income people who are starting in businesses, and that center developed a panel of lawyers and accountants who serve without fees and counsel those prospective businesses in the development of their business enterprises. We have done that for a couple of years.

We have devoted a fair amount of time to the work of public interest law firm. Although we haven't actually undertaken any litigation in the public interest law firm, we have, as a matter of fact, put in a lot of its activities.

Q. And done a good deal of fund raising for it, as a matter of fact?

A. Yes.

Q. Do you regard advertising as compatible with the professional

traditions and ideals of lawyers?

A. I certainly don't regard price advertising or advertising in any generalized sense as compatible with (41) the concept of a profession.

Q. Well, you have from time to time referred to price advertising, which obviously implies you have in mind something else. To shortcut, I'll go to it, since we have talked about it.

You do believe that listing of specialization is proper; is that correct?

A. I am -- as you know, my thinking about this is somewhat in a state of flux, but I have less concern about the dissemination in some restrained way of data bearing upon the lawyers' qualifications than I do about price advertising, about which I have already commented at length.



Q. You are seeking to sponsor a specialization program in the state, I believe?

A. It is in the process of implementation right now. The court has adopted a rule, and the Board of Specialization is going to be appointed, and that in itself will facilitate certain forms of limited information.

Q. And this, in your opinion, it would be proper and not a disservice to the public to permit lawyers to be known, for example, in the Yellow Pages classified by specialization, which would be recognized by the Bar; is that correct?

(42) A. True.

Q. And that is the kind of in-creasive (sic) advertising which you had meant to suggest would be a tolerable or even constructive, in your point of view?

A. Correct.

Q. Putting that aside now, that rather limited exception, if you regard advertising as incompatible with professional traditions and ideals, as I think you have just stated; why?

A. Well, we return to the point Mr. Canby asked me about early in cross-examination. I suppose this bears on each lawyer's own orientation. My father has been a member of the Bar for 54 years. He started his practice in Pittsburgh in 1922; had no immediate source of business; worked hard and developed what I regard as a very thriving practice, with all kinds of people with limited means, and never placed an ad in the newspaper and was, I think, busy, and served because of his reputation among the people he did serve.

When I came here, I didn't know a soul. Somehow, I think that -- we either have to make a choice, either we are going

to -- I don't think that treating the rendition of highly personal services and very personal situations can be dealt with in the same way that GEMCO sells toys to my kids and advertises specials on commodities.

(43) It may be, you know -- my views about this may prove to be incorrect, and the disciplinary authority in this state may overrule my views, but if they do, I don't think the profession will be able to continue to serve the people as it has for a good many years. I think that it will inevitably be rendering a kind of mass-produced, less personalized and less valuable kind of service.

I can draw some analogies from the medical profession, and the analogy isn't prompted by advertising on their part, but we see growing disenchantment of the medical profession, because of the increasing impersonal nature of the relationship between doctor and patient. The doctor

is somebody who the patient sees, because he was referred by another doctor. He doesn't have any kind of a one-to-one relationship with the patient; he's just a body of being dealt with by the doctor.

It seems to me that if the legal profession ends up treating clients essentially as nonentities that we won't be professionals. We can't adhere to the same tradition of integrity. You don't have the same sense of identity with your client. You can't possibly advocate your client, because with so much conviction -- I heard an explanation of how a legal clinic works. I think the legal clinic has a role in our society. One of the things that I haven't sorted out in my mind that I am concerned (44) about is that spector (sic) of about 30 prospective divorce clients in a waiting room with a lawyer giving them all a set speech before they go to court to get their default divorce. You know, I find that difficult to equate

with the notion of a professional person who is trying to deal exhaustively for his client's cause. I think it's difficult to understand one client's problem and deal with it responsibly on a given day, and then trying to deal with 30 and adhere to those traditions seems to me to be an impossible objective.

MR. FRANK: I have nothing further.

#### EXAMINATION

BY MR. CANBY:

Q. Does the Bar now monitor the practice of lawyers, or does it wait for a Complaint concerning incompetence or those serious injuries that were listed, cases, like the ones you listed, your summary?

A. Well, basically, it waits for Complaints, except in those instances where the problem is a matter of public record. Those Complaints which are typically initiated by the Board of Governors are matters which come to our attention, because

of their references in the newspaper.

Q. You don't have a regular monitoring system for competence or anything?

(45) A. No, no.

Q. You said that you undertake a certain amount of free work. Do you ever quote a client a fee, and then discover that the case is really going to take a good deal more work than you had anticipated?

Has this ever happened to you?

A. Not since my first year in law practice.

Q. Well, when that happened in your first year in law practice, what did you do?

A. I took a loss.

Q. In other words, you did the work in a competent fashion, even though you were exceeding what you could charge?

A. Yes. If the client -- I can't recall specific cases -- but if the client



was not in a position to pay an increased fee, when I had discovered that I had underestimated the size and complexity of the project, and, of course, I attempted to complete it with as much competence as I quoted correctly. But the reason it hasn't happened since the first year, I recognize that I couldn't continue to exist by having taken excess losses and still competent work.

Q. You can't take a loss on every case?

A. Even on a substantial number of cases.

Q. You did testify you do a certain amount of free (46) work, or your firm does, and so on?

A. Correct.

Q. A true professional, then, may be able to do work even though it's not necessarily related to the price that that particular individual case involves for him?

A. A true professional can do high-

quality work for nothing, as long as he is controlling the quantity of such work.

Q. Right. Do you know whether it is the practice in this state at all for lawyers to quote prices, perhaps even when a client calls and inquires by telephone as to certain kinds of services?

A. Bill, I'm sure that some lawyers do that. I will not quote a fee over the telephone. In fact, I wouldn't even quote, since my first year or second year, a set fee. I will try -- well, I'm not answering your question.

I think that some lawyers probably do quote fees.

Q. All these problems that you mentioned in the Bar, of course, exist now apart from advertising. You had no advertising cases in that list of problems that were taken?

A. No clear-cut cases, that's right.

Q. You mentioned that you can advertise

-- perhaps you might take the position you can advertise specialities perhaps in the Yellow Pages or something. You can also (47) advertise in reputable law lists; can't you?

A. True.

Q. Who uses these law lists?

Where do they go?

What is the readership of these?

A. Primarily, lawyers. They are in a good many public libraries; a number of banks; other large institutions have them, but primarily they are used by lawyers.

Q. Is there any charge or fee involved with the Bar Association?

Is the ABA, to your knowledge, on any of these law lists?

A. It's my understanding that in order to be approved as a reputable law list, you have to submit evidence that you meet certain criteria which has been established by the ABA Standing Committee on Law Lists, and pay

a fee.

I don't know exactly what the criteria are and I don't know what the fee is, but I think that's essentially true.

Q. If an attorney advertises a service at a given price, and he performs the service at that given price competently, he is not being false or misleading to his client, is he?

(48) A. No.

Q. The theory of the prepaid legal service plans, where we have a schedule of benefits, must suppose that occasional cases are going to exceed what the client will pay and most others will not; is that correct?

THE WITNESS: Would you read the question back?

(Question read by reporter.)

A. I think that's probably a fair statement.

I'm trying to recall, Bill -- I have

the feeling there may be certain escape valves, if you will, in the prepaid legal service plan, but I just don't know what they are right now. That's why I referred you to the document, when you were touching on this earlier.

Q. All right. Consequently, if there is a fixed schedule of fees, there is some spreading of price between the cases for the occasional case that will still be listed as a described benefit, but will turn out to be a little more complicated than most; right?

A. If your supposition is correct, I would say that's true.

\* \* \* \*

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## BAR EXHIBIT NO. 7

RESTATEMENT OF THE CODE OF  
PROFESSIONAL ETHICS  
CONCEPTS OF PROFESSIONAL  
ETHICS RULES OF CONDUCT  
INTERPRETATIONS OF RULES  
OF CONDUCT

BY: AMERICAN INSTITUTE OF  
CERTIFIED PUBLIC ACCOUNTANTS

The Rules of Conduct contained in  
this booklet will, upon adoption become  
effective on March 1, 1973.

\* \* \* \*

(1)

INTRODUCTION

\* \* \* \*

This document consists of three parts.  
The first part, the Concepts of Professional  
Ethics, is a philosophical essay approved by  
the Division of Professional Ethics. It is  
not intended to establish enforceable stan-  
dards since it suggests behavior beyond what  
is called for in the Rules of Conduct.

The second part, the Rules of Conduct,  
consists of enforceable ethical stan-

dards and requires the approval of the  
membership before the Rules would become  
effective. It is printed on colored  
pages to facilitate identification.

The third part, Interpretations of  
Rules of Conduct, consists of inter-  
pretations which have been adopted by the  
Division of Professional Ethics to take the  
place of the present Opinions of the Ethics  
Division upon adoption of the restated  
Rules of Conduct.

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(5)

CONCEPTS OF PROFESSIONAL ETHICS

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(14)

OTHER RESPONSIBILITIES AND PRACTICES

A certified public accountant should  
conduct himself in a manner which will  
enhance the stature of the profession and  
its ability to serve the public.

\* \* \* \*

Solicitation to obtain clients is prohibited under the Rules of Conduct because it tends to lessen the professional independence toward clients which is essential to the best interest of the public. It may also induce an unhealthy rivalry within the profession and thus lessen the cooperation among members which is essential to advancing the state of the art of accounting and providing maximum service to the public.

Advertising, which is a form of solicitation, is also prohibited because it could encourage representations which might mislead the public and thereby reduce or destroy the profession's usefulness to society. However, a CPA should seek to establish a reputation for competence and character, and there are many acceptable (15) means by which this can be done. For example, he may make himself known by public service, by civic and political activi-

ties, and by joining associations and clubs. It is desirable for him to share his knowledge with interested groups by accepting requests to make speeches and write articles. Whatever publicity occurs as a natural by-product of such activities is entirely proper. It would be wrong, however, for the CPA to initiate or embellish publicity.

Promotional practices, such as solicitation and advertising, tend to indicate a dominant interest in profit. In his work, the CPA should be motivated more by desire for excellence in performance than for material reward. This does not mean that he need be indifferent about compensation. Indeed, a professional man who cannot maintain a respectable standard of living is unlikely to inspire confidence or to enjoy sufficient peace of mind to do his best work.

In determining fees, a CPA may assess the degree of responsibility assumed by

undertaking an engagement as well as the time, manpower and skills required to perform the service in conformity with the standards of the profession. He may also take into account the value of the service to the client, the customary charges of professional colleagues and other considerations. No single factor is necessarily controlling.

Clients have a right to know in advance what rates will be charged and approximately how much an engagement will cost. However, when professional judgments are involved, it is usually not possible to set a fair charge until an engagement has been completed. For this reason CPA's should state their fees for proposed engagements in the form of estimates which may be subject to change as the work progresses.

Other practices prohibited by the Rules of Conduct include using any firm designation or description which might be mislead-

ing, or practicing as a professional corporation or association which fails to comply with provisions established by Council to protect the public interest.

\* \* \* \*

(18)

#### RULES OF CONDUCT

In the footnotes below, the references to specific rules or numbered Opinions indicate that revised sections are derived therefrom; where modifications have been made to the present rule or Opinion, it is noted. The reference to "prior rulings" indicates a position previously taken by the ethics division in response to a specific complaint or inquiry, but not previously published. The reference to "new" indicates a recommendation of the Code of Restatement Committee not found in the present Code or prior rulings of the ethics division.

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(24)



# RULE 502 -- SOLICITATION AND ADVERTISING

A member shall not <sup>(25)</sup> seek to obtain <sup>35</sup> clients by solicitation. Advertising is <sup>36</sup> a form of solicitation and is prohibited.

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35 Rule 3.02.

36 Rule 3.01.

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(31)

## INTERPRETATIONS OF RULES OF CONDUCT

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## INTERPRETATIONS UNDER RULE 502 --

### SOLICITATIONS AND ADVERTISING

502-1 -- Announcements. Publication in a newspaper, magazine or similar medium of an announcement or what is technically <sup>55</sup> known as a "card" is prohibited. Also prohibited is the issuance of a press release regarding firm mergers, opening of

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55 Rule 3.01.

new offices, change of address or admission <sup>56</sup> of new partners.

Announcements of such changes may be mailed to clients and individuals with whom professional contacts are maintained, such <sup>57</sup> as lawyers and bankers. Such announcements should be dignified and should not refer to <sup>58</sup> fields of specialization.

502-2 -- Office premises. Listing of the firm name in lobby directories of office buildings and on entrance doors solely for the purpose of enabling interested parties to locate an office is permissible. <sup>(38)</sup> The listing should be in <sup>59</sup> good taste and modest in size.

The indication of a specialty such as

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56 Opinion No. 9 (4)

57 Opinion No. 11 (1a) (qualifying phrase, "lawyers of clients", is dropped).

58 Opinion No. 11 (1b)

59 Opinion No. 11 (5a)

"income tax" in such listing constitutes<sup>60</sup>  
advertising.

502-3 -- Directories: telephone, classified and trade association. A listing in a telephone, trade association, membership or other classified directory shall not:

1. Appear in a box or other form of display, or in a type of style which differentiates it from other listings in<sup>61</sup>  
the same directory.

2. Appear in more than one place in the same classified directory.

3. Appear under a heading other than "Certified Public Accountant" or "Public Accountant" where the directory is classified by type of business occupation<sup>62</sup>  
or service.

4. Be included in the yellow pages

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60 Opinion No. 11 (5b)

61 Opinion No. 11 (2a)

62 Opinion No. 11 (2a(2))

or business section of a telephone directory unless the member maintains a bona fide office in the geographic area covered. Determination of what constitutes an "area" shall be made by referring to the positions taken by state CPA societies in the light<sup>63</sup>  
of local conditions.

Such listing may:

1. Include the firm name, partners' names, professional title (CPA), address<sup>64</sup>  
and telephone number.

2. Be included under both the geographical and alphabetical section where<sup>65</sup>  
the directory includes such sections.

502-4 -- Business stationery. A member's stationery should be in keeping with the dignity of the profession and not list<sup>66</sup>  
any specialty.

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63 Opinion No. 11 (2b)

64 Opinion No. 11 (2a(1))

65 Opinion No. 11 (2c(2))

66 Opinion No. 11 (3a)

The stationery may include the firm name, address and telephone number, names of partners, names of deceased partners and their years of service, names of professional staff when pre-(39)ceded by a line to separate them from the partners, and cities in which other offices and cor-<sup>67</sup>respondents or associates are located. Membership in the Institute or state CPA society or associated group of CPA firms whose name does not indicate a specialty<sup>68</sup> may also be shown. In the case of multi-office firms, it is suggested that the words, "offices in other principal cities" (or other appropriate wording) be used instead<sup>69</sup> of a full list of offices. Also, it is preferable to list only the names of partners resident in the office for which the

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67 Opinion No. 11 (3b(1 and 2))

68 New

69 Opinion No. 11 (3c)

<sup>70</sup>stationery is used.

502-5 -- Business cards. Business cards may be used by partners, sole practitioners and staff members. They should be in good taste and should be limited to the name of the person presenting the card, his firm name, address and telephone number(s), the words "Certified Public Accountant(s)," or "CPA" and such words as "partner", "manager" or "consultant" but without any<sup>71</sup> specialty designation.

Members not in the practice of public accounting may use the title "Certified Public Accountant" or "CPA" but shall not do so when engaged in sales promotion,<sup>72</sup> selling or similar activities.

502-6 -- Help wanted advertisements. A member shall not include his name in help-

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70 Opinion No. 11 (3c)

71 Opinion No. 11 (4a)

72 Opinion No. 11 (4b)



wanted or situations-wanted display advertising on his own behalf or that of others in any publication. In display advertising, the use of a telephone number, address, or newspaper box number is permissible.<sup>73</sup>

In classified advertisements other than display, the member's name should not appear in boldface type, capital letters or in any other manner which tends to distinguish the name from the body of the advertisement.<sup>74</sup>

502-7 -- Firm publications. Newsletters, bulletins, house organs, recruiting brochures and other firm literature on accounting and related business subjects prepared and distributed by a firm for (40) the information of its staff and clients serve a useful purpose. The distribution of such material outside the firm must be properly controlled and should be restricted to clients and

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73 Opinion No. 11 (6a)

74 Opinion No. 11 (6b)

individuals with whom professional contacts are maintained, such as lawyers and bankers.<sup>75</sup> Copies may also be supplied to job applicants, to students considering employment interviews,<sup>76</sup> to nonclients who specifically request them and to educational institutions.<sup>77</sup>

If requests for multiple copies are received and granted, the member and his firm are responsible for any distribution by the party to whom they are issued.<sup>78</sup>

502-8 -- Newsletters and publications prepared by others. A member shall not permit newsletters, tax booklets or similar publications to be imprinted with his firm's name if they have not been prepared by his

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75 Opinion No. 9 (1) (qualifying phrase, "lawyers of clients," is dropped).

76 New.

77 Opinion No. 9 (1)

78 Opinion No. 9 (1)

79  
firm.

502-9 -- Responsibility for publisher's promotional efforts. It is the responsibility of a member to see that the publisher or others who promote distribution of his writing, observe the boundaries of professional dignity and make no claims that are not truthful and in good taste. The promotion may indicate the author's background including, for example, his education, professional society affiliations and the name of his firm,<sup>80</sup> the title of his position<sup>81</sup> and principal activities therein. However, a general designation referring to any specialty, such as "tax expert" or "tax consultant"<sup>82</sup> may not be used.

502-10 -- Statements and information

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79 Opinion No. 1

80 Opinion No. 4.

81 New.

82 Opinion No. 5.

to the public press. A member shall not directly or indirectly cultivate publicity which advertises his or his firm's professional attainments or services. He may respond factually when approached by the press for information concerning his firm, but he should not use press inquiries as a means of aggrandizing himself or his firm or of advertising professional attainments or services. When interviewed by a writer or reporter, he is charged with the knowledge that he (41) cannot control the journalistic use of any information he may give and should notify the reporter of the limitations imposed by professional<sup>83</sup> ethics.

Releases and statements made by members on subjects of public interest which may be reported by the news media, and publicity not initiated by a member such as that which

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83 Restatement of Opinion No. 9 (4).

may result from public service activities, are not considered advertising. However, press releases concerning internal matters in a member's firm are prohibited.

502-11 -- Participation in educational seminars. Participation by members in programs of educational seminars, either in person or through audiovisual techniques, on matters within the field of competence of CPA's is in the public interest and is to be encouraged. Such seminars should not be used as a means of soliciting clients. Therefore, certain restraints must be observed to avoid violation of the spirit of Rule 502 which prohibits solicitation and advertising. For example, a member or his firm should not:

1. Send announcements of a seminar to nonclients or invite them to attend. However, educators may be invited to attend to further their education.

2. Sponsor, or convey the impression

that he is sponsoring, a seminar which will be attended by nonclients. However, a member or his firm may conduct educational seminars solely for clients and those serving his clients in a professional capacity, such as bankers and lawyers.

In addition, when a seminar is sponsored by others and attended by nonclients, a member or his firm should not:

1. Solicit the opportunity to appear on the program.
2. Permit the distribution of publicity relating to the member or his firm in connection with the seminar except as permitted under Interpretation 502-9.
3. Distribute firm literature which is not directly relevant to a subject being presented on the program by the member or persons connected with his firm.<sup>84</sup>

502-12 -- Solicitation of former



clients. Offers by a member to provide services after a client relationship has been clearly termin-(42)ated, either by completion of a nonrecurring engagement or by direct action of the client, constitute a violation of Rule 502 pro-  
85  
hibiting solicitation.

502-13 -- Soliciting work from other practitioners. Rule 502 does not prohibit a member in the practice of public accounting from informing other practitioners of his availability to provide them or their clients with professional services. Because advertising comes to the attention of the public, such offers to other practitioners must be made in letter form or  
86  
by personal contact.

502-14 -- Fees and professional standards. The following statement is required

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85 Restatement of Opinion No. 20

86 Restatement of Opinion No. 7

to be published with the Code of Professional Ethics pursuant to the Final Judgment in the court decision referred to below:

The former provision of the Code of Professional Ethics prohibiting competitive bidding, Rule 3.03, was declared null and void by the United States District Court for the District of Columbia in a consent judgment entered on July 6, 1972, in a civil antitrust suit brought by the United States against the American Institute. In consequence, no provision of the Code of Professional Ethics now prohibits the submission of price quotations for accounting services to persons seeking such services; and such submission of price quotations is not an unethical practice under any policy of the Institute. To avoid misunderstanding it is important to note that otherwise unethical conduct (e.g., advertising, solicitation, or substandard work)

is subject to disciplinary sanctions regardless of whether or not such unethical conduct is preceded by, associated with, or followed by a submission of price quotations for accounting services. Members of the institute should also be aware that neither the foregoing judgment nor any policy of the Institute affects the obligation of a certified public accountant to obey applicable laws, regulations or rules of any state or other governmental authority.<sup>87</sup>

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87 New.

\* \* \* \*

#### BAR EXHIBIT NO. 8

#### ARIZONA STATE BOARD OF ACCOUNTANCY

#### RULES AND REGULATIONS

\* \* \* \*

(14)

#### IX. RULES OF PROFESSIONAL CONDUCT

\* \* \* \*

(19)

#### OTHER RESPONSIBILITIES AND PRACTICES:

\* \* \* \*

(2) Solicitation and Advertising: A certified public accountant or a public accountant shall not seek to obtain clients by solicitation. Advertising is a form of solicitation and is prohibited.

(a) Announcements: Publication in a newspaper, magazine or similar medium of an announcement or what is technically known as a "card" is prohibited. Also prohibited is the issuance of a press release regarding firm mergers, opening of new offices, change of address or admission of new partners. Announcements of such changes may be mailed to clients and individuals with whom professional contacts are maintained, such as lawyers and bankers. Such announcements should be dignified and should not refer to fields of specialization.

(b) Office Premises: Listing of the

firm name in lobby directories of office buildings and on entrance doors solely for the purpose of enabling interested parties to locate an office is permissible. The listing should be in good taste and modest in size. The indication of a specialty such as "income tax" in such listing constitutes advertising.

(c) Directories: Telephone, Classified and Trade Association: A listing in a telephone, trade association, membership or other classified directory may include the firm name, partners' names, professional title (CPA or PA), address and telephone number. A listing may be included under both the geographical and alphabetical section where the directory includes such sections. In no event shall the listing:

- (20) (i) Appear in a box or other form of display, or in a type or style which differentiates it from

other listings in the same directory.

(ii) Appear in more than one place in the same classified directory.

(iii) Appear under a heading other than "certified public accountant" or "public accountant"

where the directory is classified by type of business occupation or service.

(iv) Be included in the yellow pages or business section of a telephone directory unless the certified public accountant or public accountant maintains a bona fide office in the geographic area covered by the directory.

(d) Business Stationery: A certified public accountant's or public accountant's stationery should be in keeping with the dignity of the profession and not list any specialty. The stationery may include the



firm name, address and telephone number, names of partners, names of deceased partners and their years of service, names of professional staff when preceded by a line to separate them from the partners, and cities in which other offices and correspondents or associates are located. Membership in the institute or state certified public accountant society or associated group of certified public accountant firms whose name does not indicate a specialty may also be shown.

(e) Business Cards: Business cards may be used by partners, sole practitioners, and staff members. They should be in good taste and should be limited to the name of the person presenting the card, his firm name, address and telephone number(s), the words "Certified Public Accountant(s)," "Public Accountant(s)," "CPA", "PA", and such words as "Partner," "Manager" or "Consultant" but without any specialty designa-

tion.

Certified public accountants or public accountants not in the practice of public accounting may use the title "Certified Public Accountant" or "CPA", "Public Accountant" or "PA" on business cards or otherwise but shall not do so when engaged in sales promotion, selling or similar activities.

(f) Help Wanted Advertisements: A certified public accountant or a public accountant shall not include his name in help-wanted or situations-wanted display advertising on his own behalf or that of others in any publica-(21)tion. In display advertising, the use of a telephone number, address, or newspaper box number is permissible.

In classified advertisements the name of the certified public accountant or public accountant should not appear in boldface type, capital letters or in any

other manner which tends to distinguish the name from the body of the advertisement.

(g) Firm Publications: Newsletters, bulletins, house organs, recruiting brochures and other firm literature on accounting and related business subjects prepared and distributed by a firm for the information of its staff and clients serve a useful purpose. The distribution of such material outside the firm must be properly controlled and should be restricted to clients and individuals with whom professional contacts are maintained, such as lawyers and bankers.

Copies may also be supplied to job applicants, to students considering employment interviews, to nonclients who specifically request them and to educational institutions.

If requests for multiple copies are received and granted, the certified public

accountant or public accountant and his firm are responsible for any distribution by the party to whom they are issued.

(h) Newsletters and Publications Prepared by Others: A certified public accountant or public accountant shall not permit newsletters, tax booklets or similar publications to be imprinted with his firm's name if they have not been prepared by his firm.

(i) Responsibility for Publisher's Promotional Efforts: It is the responsibility of the certified public accountant or public accountant to see that the publisher or others who promote distribution of his writing, observe the boundaries of professional dignity and make no claims that are not truthful and in good taste. The promotion may indicate the author's background, including, for example, his education, professional society affiliations and the name of his firm, the title

of his position and principal activities therein. However, a general designation referring to any specialty, such as "Tax Expert" or "Tax Consultant" may not be used.

(j) Statements and Information to the Public Press: A certified public accountant or public accountant shall not directly or indirectly cultivate publicity which advertises his or his firm's professional attainments or services. He may respond factually when approached by the press for information concerning his firm, but he should not use the press inquiries as a means of aggrandizing himself or his firm or of advertising professional attainments or services. When interviewed by a writer or reporter, he is charged with the knowledge that he cannot control the journalistic use of any information he may give and should notify the reporter of the limitations imposed by

professional ethics.

Releases and statements made by certified public accountants or public accountants on subjects of public interest which may be reported by the news media, and publicity not initiated by the certified public accountant or public accountant such as that which may result from public service activities, are not considered advertising. However, press releases concerning internal matters in a certified public accountant's or public accountant's firm are prohibited.

(k) Participation in Educational Seminars: Participation by certified public accountants or public accountants in programs of educational seminars, either in person or through audio-visual techniques, on matters within the field of competence of certified public accountants or public accountants is in the public interest and is to be encouraged. Such



seminars should not be used as a means of soliciting clients. Therefore, certain restraints must be observed to avoid violation of the spirit of Rule 9-E(2) which prohibits solicitation and advertising.

For example, a certified public accountant or public accountant should not:

(i) Send announcements of a seminar to nonclients or invite them to attend. However, educators may be invited to attend to further their education.

(ii) Sponsor, or convey the impression that he is sponsoring, a seminar which will be attended by nonclients. However, a certified public accountant or public accountant may conduct educational seminars solely for clients and those serving his clients in a professional capacity such as bankers and lawyers.

In addition, when a seminar is sponsored by others and attended by nonclients, a certified public accountant or public accountant should not:

(iii) Solicit the opportunity to appear on the program.

(iv) Permit the distribution of publicity relating to the certified public accountant or public accountant in connection with the seminar except as permitted under Rule 9-E (2) (i).

(23) (v) Distribute firm literature which is not directly relevant to a subject being presented on the program by the certified public accountant or public accountant or persons connected with his firm.

(1) Solicitation of Former Clients:

Offers by a certified public accountant or public accountant to provide services after a client relationship has been clearly ter-

minated, either by completion of a nonrecurring engagement or by direct action of the client, constitute a violation of this rule.

(m) Soliciting Work from Other Practitioners: This rule does not prohibit a certified public accountant or public accountant from informing other practitioners of the availability to provide them or their clients with professional services. Because advertising comes to the attention of the public, such offers to other practitioners must be made in letter form or by personal contact.

\* \* \* \*

BAR EXHIBIT NO. 9

ETHICAL STANDARDS OF THE

ACCOUNTING PROFESSION

BY: JOHN L. CAREY AND

WILLIAM O. DOHERTY

American Institute of Certified

Public Accountants

(47)

\* \* \* \*

## SEC. 29 -- ADVERTISING

The general prohibition against advertising is accepted today without much question. To be sure, there is nothing illegal or immoral about advertising as such, but it is almost universally regarded as unprofessional.

Younger accountants are sometimes tempted to advertise or solicit, and they may suspect that the rules are a result of a conspiracy among their older colleagues to protect themselves against new competition.

Actually the rule against advertising has many sound reasons to support it. In the first place, advertising would not benefit the young practitioner. If it were generally permitted, the larger, well-established firms could afford to advertise on a scale that would throw the young practitioner wholly in the shade. Secondly,

advertising is commercial. Professional accounting service is not a tangible product to be sold like any commodity. Its value depends on the knowledge, skill and (48) honesty of the CPA. Who would be impressed with a man's own statement that he is intelligent, skillful and honest? Lastly, advertising does not pay. The accountants in the early days who tried it agreed for the most part that it did not attract clients.

Rule 3.01 of the Institute's Code of Professional Ethics forbids advertising. It reads as follows:

A member or associate shall not advertise his professional attainments or services.

Publication in a newspaper, magazine or similar medium of an announcement or what is technically known as a card is prohibited.

A listing in a directory is restricted

to the name, title, address and telephone number of the person or firm, and it shall not appear in a box, or other form of display or in a type or style which differentiates it from other listings in the same directory. Listing of the same name in more than one place in a classified directory is prohibited.

#### SEC. 30 -- CLASS OF SERVICE

Nothing is said in Rule 3.01 about the inclusion of descriptions on letterheads or elsewhere of classes of services rendered, such as audits, taxes, and systems. The committee on professional ethics, on the assumption that most people are aware of the usual services performed by CPA's, has interpreted Rule 3.01 to prohibit the association with a member's name of designations indicating special skills or the particular services he is prepared to render.\* Previously, the American In-

\* Opinion No. 11, page 20



stitute had agreed that a member should be prohibited from describing himself as a "tax consultant" or "tax expert" or from using any similar self-designation in the field of taxation.\*\*

\*\* Opinion No. 5, page 193.

\* \* \* \*

#### BAR EXHIBIT NO. 10

\* \* \* \*

#### AMENDED DISCIPLINARY RULE

On February 17th, 1976, the House of Delegates of the American Bar Association amended Disciplinary Rule 2-102(A) (6) to read as follows:

(New material italicized; deleted material bracketed):

#### TEXT OF THE AMENDED DISCIPLINARY RULE

As adopted, it amends D.R. 2-102 (A) (5) and (6), the principal amendment being of 2-102(A) (6), which enumerates listable information and which now reads (new material italicized; deleted material bracketed):

(6) A listing in a reputable law list, [or] legal directory, a directory published by a state, county or local bar association, or the classified section of telephone company directories giving brief biographical and other informative data. A law list or any directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list or any directory is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates[;], a statement that practice is limited to one or more fields of law [;], or a statement that the lawyer

or law firm specializes in a particular field of law or law practice, to the extent permitted by the authority having jurisdiction under state law over the subject and in accordance with rules prescribed by that authority; [but only if authorized under DR 2-105 (A) (4)] date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; memberships in scientific, technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their

consent, names of clients regularly represented[.]; whether credit cards or other credit arrangements are accepted; office and other hours of availability; a statement of legal fees for an initial consultation or the availability upon request of a written schedule of fees or an estimate of the fee to be charged for the specific services; provided, all such published data shall be disseminated only to the extent and in such format and language uniformly applicable to all lawyers, as prescribed by the authority having jurisdiction by state law over the subject.

\* \* \* \*

RESPONDENTS EXHIBIT NO. 11

[TEXT: LETTER

TO ARIZONA STATE

BOARD OF ACCOUNTANCY]

\* \* \* \*

Gentlemen:

As your legal representative we feel

it is our obligation to write concerning a matter about which the Attorney General has given you advice several times over the past years. Because of recent legal developments, the advice rendered to you by this office on this matter on previous occasions is no longer applicable.

[Prior Opinions]

We refer in particular to Rule 9-E (6), now designated as A.C.R.R. R4-1-56.E.6 of the Arizona State Board of Accountancy Rules and Regulations. This Rule prohibits competitive bidding by Certified Public Accountants on the ground that it is not in the public interest, is a form of solicitation and is unprofessional. The anticompetitive effect of the rule is clear. There is no doubt that it would violate the federal and state antitrust laws if adopted by private individuals. The only remaining issue is the effect of Rule R4-1-56.E.6 on that conclusion. On July 25, 1966, the

Attorney General rendered an opinion at your request concluding that the predecessor to Rule R4-1-56.E.6 had the effect of law since its promulgation was within the authority of the State Board of Accountancy and that the rule did not conflict with the anti-trust law of the State of Arizona. See Opinion No. 66-29L [1966 TRADE CASES ¶71,880]. On May 7, 1971, this office wrote you a letter stating that the Board's rule against competitive bidding did not violate either the federal or state antitrust laws. Basically, the letter confirmed Attorney General Opinion No. 66-29-L. Finally, on January 2, 1974, the Attorney General approved and certified this Rule which was adopted by the Arizona State Board of Accountancy on December 27, 1973.

[Court Decisions]

Because of recent legal developments,



Rule R4-1-56.E.6 is unlawful under the federal and Arizona antitrust laws, and is void and beyond the scope of the Board's authority. The two most important developments involve actions by the United States Supreme Court and the Arizona Legislature. Many years ago the United States Supreme Court held that certain types of activities were immune from the federal antitrust laws if those activities were authorized by a state pursuant to a valid exercise of its police powers.

Parker v. Brown [1940-1943 TRADE CASES ¶56,250], 317 U.S. 341 (1943). There was much confusion and debate, however, over the nature and extent of the state action that was required in order to produce immunity. On June 16, 1975, the United States Supreme Court finally dealt with this problem again and some of the confusion has been clarified. In Goldfarb v. Virginia State Bar [1975-1 TRADE CASES

¶60,355, 95 S. Ct. 2004 A.R.S. §32-703 (A) has delegated power to the Accountancy Board to adopt "rules of conduct appropriate to establish and maintain a high standard of integrity and dignity in public accounting," that statute is not sufficient to satisfy the requirements delineated by the Supreme Court in Goldfarb. Although the Virginia Legislature had empowered the Supreme Court of Virginia to regulate the conduct of the legal profession, the United States Supreme Court found no immunity from federal antitrust prosecution since there was no state statute referring specifically to fees. That situation is analogous to the one presented by A.R.S. §32-703 (A). Neither that statute nor any other provision of the statutes dealing with accountancy refer specifically to the prices charged by Certified Public Accountants; nor do they manifest a clear intention of the Arizona Legislature to abandon compe-

tition in the provision of accountancy services. Thus, Rule R4-1-56.E.6 would not provide immunity from federal antitrust prosecution and is therefore unlawful and void. Moreover, Rule R4-1-56.E.6. is also unlawful under the Arizona Antitrust Law, A.R.S. §§44-1401 et. seq. if the state action doctrine, as clarified by the United States Supreme Court in Goldfarb, is applied to resolve conflict between the Arizona Antitrust Law and Rule R4-1-56.E.6.

However, it is likely that a narrower doctrine should be used to resolve the latter conflict. The state action doctrine was developed in the context of conflicts between the federal antitrust laws and exercises of state police power. Because of the considerations of federalism it would seem appropriate to allow a certain measure of latitude to states in the exercise of their police powers absent any constitutional objection. These considera-

tions are not present in an attempt to resolve a conflict between the Arizona Antitrust Law and another act of the Arizona Legislature or regulation of a state agency. The problem there is simply a conflict between the legislative expressions of one body, and the problem is one of determining the intent of the Legislature as to which statute ought to control. Normally when a legislature wishes to create an exemption from the antitrust laws it enacts an express immunity provision as part of the antitrust law or, more commonly, as part of the particular regulatory scheme.

[New State Antitrust Law]

In the Spring of 1974, the Arizona Legislature enacted the present Antitrust Law. A.R.S. §§ 44-1401 to 44-1413. Its actions at that time are very pertinent in regard to the question of whether Rule R4-1-56.E.6 affects the application of the

Arizona Antitrust Law to the activities of accountants. In the Senate Judiciary Committee a broad general amendment was offered that would have created an exemption from the Arizona Antitrust Law because of Rule R4-1-56.E.6. That amendment was rejected. Moreover, the Senate Judiciary Committee did accept and the full Legislature enacted several provisions granting exemption from the Arizona Antitrust Law because of the regulatory power and activities of particular state agencies. See, e.g., A.R.S. §40-286. (Public service corporations holding certificates of Public Convenience and Necessity granted by the Arizona Corporation Commission.) In total five express exemptions in separate statutes and one limited express exemption in the antitrust law itself (A.R.S. §44-1404) were enacted when the current Arizona Antitrust Law was passed. None of them deals with Certified Public Accountants and their regulation by

the State Board of Accountancy. Moreover, at that time it was expressly pointed out to the Senate Judiciary Committee that it might be appropriate to include some exemptions for professions and occupations regulated under Title 32. However, the Legislature chose to include no exemptions regarding regulation under Title 32. While it is possible to find an implied repeal of an antitrust statute, they are uncommon and "strongly disfavored". See Otter Tail Power Co. v. United States [1973-1 TRADE CASES ¶74-373], 410 U.S. 366, 93 S. Ct. 1022 (1973). Moreover, in this particular case an implied repeal is not even theoretically possible since the Arizona Antitrust Law was passed subsequent to the enactment of A.R.S. §32-703(A) and the promulgation of Rule R4-1-56.E.6. Thus, in light of the legislative history regarding the recent passage of the Arizona Antitrust Law it is clear that the Arizona Legislature



did not intend that there be any exemption from the Antitrust Law because of Rule R4-1-56.E.6 or any other regulation by the State Board of Accountancy. This is thus a second reason supporting the conclusion that Rule R4-1-56.E.6 is unlawful and void.

[Absence of Immunity]

In summary, we feel that, as a result of the decision by the United States Supreme Court in the Goldfarb case and the action by the Arizona Legislature in enacting the Arizona Antitrust Law, Rule R4-1-56.E.6 would provide no immunity for private individuals from prosecution under both the federal and state antitrust laws and is therefore unlawful and void. In light of our conclusion we advise and recommend that you proceed as quickly as possible to repeal Rule R4-1-56.E.6.

Sincerely,

Bruce E. Babbitt  
The Attorney General

\* \* \* \*

RESPONDENTS' EXHIBIT NO. 12

(1)

ARIZONA LEGAL SERVICES  
ANSWERS ABOUT ALS  
BYLAWS AND PARTICIPATING  
ATTORNEY RULES

\* \* \* \*

(2)

ATTORNEY'S INFORMATION MANUAL  
PREPAID LEGAL SERVICES PROGRAM

CONFIDENTIAL

\* \* \* \*

(3)

WHAT IS THE ARIZONA LEGAL SERVICES  
PREPAID AND GROUP LEGAL SERVICES PLAN?

ALS Prepaid and Group Legal Services Plan is Arizona's Prepaid Legal Expense Insurance Program--an open panel, free-choice-of-attorney prepaid legal insurance program.

Arizona Legal Services, Inc. (ALS) is a non-profit corporation created, sponsored and initially funded by the Arizona

State Bar. The Board of Directors is composed, at this time, of members of the State Bar who were elected to the Board by members of the State Bar's Group and Prepaid Legal Committee. As the program develops, provision has been made in the corporate charter for lay people to serve on the Board of Directors also.

ALS Prepaid and Group Legal Services Plan is the product of three years of research and developmental work by the Arizona State Bar's Committee on Prepaid Legal Services and other interested and dedicated members of the bar. A good deal of work and research has also been contributed by Midwest Mutual, who is underwriting the program.

ALS Prepaid and Group Legal Services Plan is the legal profession's response to a pressing public need. People in the middle and lower-middle income groups--approximately 70% of our population--are not

getting lawyer's services when and to the extent they should. Sometimes this is because they cannot afford these services; sometimes because they think they cannot afford the services; sometimes because they do not even know that they have a legal problem or that a lawyer should help them.

ALS Prepaid and Group Legal Services Plan is a comprehensive program of insurance service and education to meet this need. The program is underwritten by Midwest Mutual Insurance Company, a Best's A+ rated nonassessable mutual insurance company, which has independently done substantial developmental work on legal (sic) cost insurance.

ALS Prepaid and Group Legal Services Plan will be issued to qualified groups and in the name of Midwest, policies insuring group members (and their dependents if they wish) against the costs of covered legal services. ALS will then provide the

group members a panel of "Participating Attorneys" who will furnish the covered legal services, plus related educational and administrative services.

#### WHAT ARE "PARTICIPATING ATTORNEYS"?

Participating Attorneys are those attorneys who agree to provide the services covered under the policies of legal costs insurance underwritten by Midwest Mutual and issued through Arizona Legal Services, Inc., and to accept payment under those policies as payment in full. Each insured will be free to select any Participating Attorney they wish. A list of Participating Attorneys will be provided to representatives of insured groups, and Arizona Legal Services, Inc. will operate a program for insureds who do not have or do not know a Participating Attorney from whom the insured is free to select the Participating Attorney of his choice.

#### (4)WHO CAN BE AN ARIZONA LEGAL

#### SERVICES, INC. PARTICIPATING ATTORNEY

\*Any active member of the Arizona State Bar who meets the requirements and agrees to the terms of the ALS Participating Attorney Rules, policies and procedures can be an ALS Participating Attorney.

\*The requirements to become an ALS Participating Attorney include the following:

--Agreement to the methods and rates of payment for covered services as from time to time established by ALS:

--Maintaining an office for the full or part-time private practice of law within Arizona;

--Agreement to continue as a Participating Attorney for one year from the date of enrollment;

--Agreement to provide services to ALS insureds--subject to the attorney's right to reject a client on any reasonable grounds.

\*The requirements to become a Participating Attorney are contained in the ALS



Participating Attorney Rules, which accompany this information.

WHY SHOULD YOU BE A  
PARTICIPATING ATTORNEY?

\*Because the public needs your help.

Studies have shown that people in the middle and lower-middle income groups are not receiving lawyer's services when and to the extent they should. This is largely because of cost or fear of cost. People do not budget for unexpected legal problems. They do not obtain essential legal advice or representation before they get in trouble or before their legal problems become severe and beyond their economic capabilities. Prepaid legal services, and your participation will meet and serve their now unmet needs.

\*Because the legal profession needs your help, and because the Bar must provide a better method of delivering legal services to more people. Middle and lower-

middle income people, through labor unions, consumer groups and other associations, as well as individually, are becoming increasingly aware of the necessity for better delivery of legal services. They are becoming increasingly concerned about this problem and are requesting--in many cases now demanding--that the legal profession take the lead in providing a solution. There is increasing evidence that prepaid legal services in some form, or possibly other solutions which do not involve lawyers at all, are inevitable. It is in the best interest of both the public and the legal profession, it is imperative, that the profession take the lead in making certain that essential legal services are readily available to all the public, in accordance with basic ethical precepts.

\*Because ALS needs your help. If ALS is to succeed as Arizona's open panel, free-choice-of-attorney program it is essential

that a very substantial majority of our private practitioners become Participating Attorneys.

(5) \*Because it can directly benefit you.

ALS Prepaid and Group Legal Services Plan is the way to bring you together with an untapped and potentially vast source of clients. As ALS grows, you and other Arizona lawyers will be able to provide increasingly essential legal services to a growing number of middle and lower-middle income Arizonans. The payment for your services will be "guaranteed" subject to the policy benefits and methods of payment discussed below. This can mean elimination of "uncollectables" and no more time-consuming and expensive collection problems. Even for your existing clients, if as they become ALS insureds, you will be able to provide legal services which they could not previously afford or which you could

not provide on an economic basis.

#### HOW DO YOU ENROLL AS AN ALS PARTICIPATING ATTORNEY

After you have reviewed the materials provided, please complete the enclosed application form and submit it to Arizona Legal Services, Inc., P. O. Box 7283, Phoenix, Arizona 85011.

There is no charge to become an ALS Participating Attorney.

#### HOW WILL THE ALS PROGRAM WORK?

Concurrent with ALS's issuance of an ALS/Midwest insurance policy to a qualified group, ALS will enter into a "Direct Service Contract" with the group. Under that Contract, ALS will furnish to the insured group members its panel of Participating Attorneys--the attorneys who have agreed to provide the covered legal services at no cost to the insureds (beyond the premiums already paid by or for them). The individual insureds will be free to select from

among those Participating Attorneys. A periodically up-dated list of Participating Attorneys will be provided to designated representatives of the insured groups, and ALS will operate a referral program for insureds who do not know or have a Participating Attorney. In addition, ALS will develop and provide educational materials and services designed to promote "preventive law" and the responsible use of coverage.

Participating Attorneys who provide covered services will be paid directly by ALS in amounts not exceeding the maximum amounts set forth in the policy. Under the terms of ALS's agreement with Midwest Mutual during any twelve month period the insurance company will pay out for claims up to and including eighty percent of earned premiums on all policies in effect during that period. Participating Attorneys will be obligated to provide the

covered services during that period; but to protect those who provide covered services late in a period, and to protect against incurred but unreported claims, all Participating Attorneys will be paid in two stages. Initially, upon submission of claims, each attorney will be paid 60% of his fee. The balance will be deposited in an Arizona bank and shortly after the end of a period that balance will be paid together with the interest earned thereon. If, however, claims have exceeded eighty percent of earned premiums then the second distribution will be reduced so that all Participating Attorneys who provided services will bear the risk of excess claims on a pro-rata basis.

\* \* \* \*

(14)

#### PARTICIPATING ATTORNEY RULES

These Participating Attorney Rules (hereinafter referred to as Rules), adopted



on November 8, 1974, by the Board of Directors of ARIZONA LEGAL SERVICES, INC. (hereinafter referred to as ALS), are as follows:

\* \* \* \*

(15)

SECTION 3. ACCEPTANCE AND  
REJECTION OF CLIENT;  
WITHDRAWAL FROM REPRESENTATION

A participating attorney shall accept each insured, who requests his services or is referred to him by ALS as a client. He may, however, reject an insured on any reasonable grounds, but shall not reject any insured seeking his services by reason of amount of fees to which he may be entitled under the terms of the program.

If a participating attorney rejects an insured or withdraws from further representation of an insured, he shall promptly report in writing to ALS (on a form to be furnished by ALS) his reasons for such a rejection or withdrawal. If that insured indicates a desire to be referred

to another attorney, the participating attorney shall endeavor to refer such insured to another participating attorney willing to serve the insured; however, with respect to rejection only, the participating attorney may instead immediately request of ALS, by telephone, that such insured be referred to another participating attorney pursuant to the ALS referral program.

\* \* \* \*

(16)

SECTION 5. PAYMENT.

Each participating attorney shall accept payment for covered services provided to an insured according to such methods and at such rates as the Board of Directors of ALS may from time to time establish, and shall accept such payment as payment in full therefor and shall make no additional charges therefor to the insured.

\* \* \* \*

(20)

## WHAT DOES THE ALS PROGRAM PROVIDE AND PAY?

The maximum amount the Company shall be obligated to pay on behalf of all INSUREDS to ARIZONA LEGAL SERVICES, INC. (hereinafter referred to as ALS), for the benefit of ATTORNEY, for any twelve month period shall be eighty percent (80%) of earned premium.

The amounts that the Company shall be obligated to pay on behalf of an INSURED to ALS for the benefit of ATTORNEY, for each item of each coverage and the maximum amount for each coverage listed below during such twelve month period shall be:

<u>Coverages</u>	<u>Item Charge</u>	<u>Maximum Benefits</u>
A. Non-business bankruptcy		\$300
1. Preparing schedules and first meeting of creditors:		
(a) Individual	\$225	

<u>Coverages</u>	<u>Item Charge</u>	<u>Maximum Benefits</u>
(b) Joint (Individual and Spouse) additional	\$ 75	
B. <u>Marital Proceedings</u>		
1. Dissolution of Marriage, Annulment or Separation		
(a) NAMED INSURED Only		\$600
(1) Uncontested dissolution, annulment or separate maintenance without Order to Show Cause and Exclusive of Property Settlement Agreement	\$250	
(2) Original Order to Show Cause	\$100	
(3) Any other Order to Show Cause or Motion, or defense thereof (not exceeding two such matters)	\$100 each	
(21)		
(4) Property Settlement (not exceeding four (4) hours)	\$150	

474

<u>Coverages</u>	<u>Item Charge</u>	<u>Maximum Benefits</u>
------------------	--------------------	-------------------------

(5) Contested dissolution,

Annulment or separate maintenance--same as "Civil Actions" this schedule

(b) For spouse's legal fees if family plan

\$300\*

\$300\*

or

2. Defense of Motion to modify dissolution, annulment or separate maintenance decree

\$ 40 per hour, not to exceed \$300

\*Indemnity - this sum is available to spouse for attorneys fees, but attorney is not restricted to charging this amount. Additional fees, if any, would be charged directly to spouse and would not be covered under this program.

C. Court Adoption Proceeding

\$500

1. Agency Adoption

\$150

475

<u>Coverage</u>	<u>Item Charge</u>	<u>Maximum Benefits</u>
-----------------	--------------------	-------------------------

2. Step-parent Adoption

\$150

3. Obtain Consent-additional

\$75

4. Nonconsent Adoption-additional

\$150

5. Independent Adoption

\$200

6. Contested-same as "Civil Actions" this schedule

D. Guardianship and Conservatorship

Same as "Civil Actions" this schedule

E. Juvenile Court Proceedings

(Preparation, negotiation and court appearance)

\$100

\$200

F. Habeas Corpus Court Proceedings

\$200

(22)

G. Defense of Felony Charges

\$1,250



476		
<u>Coverages</u>	<u>Item Charge</u>	<u>Maximum Benefits</u>
1. Appearance on Felony Charge and Preliminary Hearing Only	\$ 235	
2. Felony disposition:		
(a) Arraignment--half day, and plea negotiations	\$ 325	
OR		
(b) Arraignment; preparation; and trial up to and including 4 days	\$1,100	
3. Probation and Sentence only	\$ 200	
H. <u>Defense of Charge of Driving While Intoxicated</u>		\$500
1. Misdemeanor Arraignment	\$ 100	
2. Misdemeanor Disposition:		
(a) Plea negotiations and disposition	\$ 150	
OR		
(b) Trial preparation; and trial up		

477		
<u>Coverage</u>	<u>Item Charge</u>	<u>Maximum Benefits</u>
to and including 4 days (including de novo appeal to Superior Court)	\$ 500	
I. <u>Defense of Misdemeanor Charges Involving Violation of Motor Vehicle Traffic Statutes</u>		
(Same as Schedule H above)		
J. <u>Defense of Misdemeanor Charges Except Traffic Violations, Disturbing the Peace and Intoxication</u>		
(Same as Schedule H above)		
(23)		
K. <u>Defense of Civil Action except Use of SELF PROPELLED VEHICLE</u>		\$1,000
1. Pleading		
Preparation, filing and appearances on Demurrer or Motion; preparation of Answer, Response, Counterclaim	\$ 40 per hour up to \$250	

478

<u>Coverage</u>	<u>Item Charge</u>	<u>Maximum Benefits</u>
2. Preparation (Plus pleading above)		
Filing and serving interrogatories; answering interrogatories; depositions; pre-trial or settlement conferences; preparation for trial	\$ 40 per hour up to \$650	
3. Trial up to and including four days (plus pleading and preparation above)	\$ 40 per hour for pleading and preparation; \$125 per one-half day for Trial; up to \$1,000	
<u>L. Legal Advice, Negotiations and Simple Document Preparation</u>	\$ 20 per one-half hour	\$ 160
<u>M. Major Trial</u>		
1. Homicide or Conspiracy	\$100 per one-half day	\$7,500
OR		
2. All other	\$125 per one-half day	\$2,500

479

\* \* \* \*

## RESPONDENTS EXHIBIT NO. 17

CASES OPENED AFTER ADVERTISING

Domestic Relations	35
Bankruptcy	16
Name Change	5
Adoption	4
Personal Injury	4
Real Estate	2
Wills	2
Collection	1
Probate	1
Miscellaneous	5

TOTAL 75

CASES OPENED DUE TO ADVERTISING

Bankruptcy	10
Adoption	4
Name Change	4
Personal Injury	2
Wills	1

480

Miscellaneous 5

---

TOTAL 24

Cases opened after advertising 75

Less Domestic Relations cases 35

---

TOTAL 40

24 cases out of 40 cases opened were  
due as a result of Advertising, or 60%.

\* \* \* \*

STIPULATION FOR ADDITION TO THE RECORD  
(Filed April 23, 1976)

The parties stipulate that if an appropriate member of the Arizona Republic were called as a witness, the testimony would be that the Sunday circulation of the Republic outside the State of Arizona is at least 2,000 copies. This datum of fact may be added to the record without objection by the Complainant, who waives cross-examination.

Respectfully submitted this 8th day

481

of April, 1976.

Lewis and Roca  
By Orme Lewis  
John R. Frank  
Attorneys for The  
State Bar of Arizona

William C. Canby, Jr.  
Attorney for Respondents

\* \* \* \*

SPECIAL LOCAL ADMINISTRATIVE COMMITTEE  
OF THE  
STATE BAR OF ARIZONA

FOR

DISTRICT NO. 5

In the Matter of a Member of	)	
The State Bar of Arizona	)	
	)	
JOHN R. BATES and	)	No. 76-1-S16
VAN O'STEEN,	)	
	)	
Respondents.	)	
	)	

---

FINDINGS OF FACT AND CONCLUSIONS OF LAW -  
ADMINISTRATIVE COMMITTEE  
(Filed April 8, 1976)

This matter having come on for full  
and final hearing on April 7, 1976, before  
the Special Administrative Committee of  
Ivan Robinette, Carl W. Divelbiss, and



Philip E. von Ammon, Chairman, and the matter having been heard, evidence having been taken, and briefs having been submitted, it is now determined and recommended by the Committee as follows:

FINDINGS OF FACT

The Respondents, John R. Bates and Van O'Steen, did, in fact, cause an advertisement for their law office to be published in a Phoenix newspaper, as charged in the Formal Complaint and as admitted in the Answer.

CONCLUSIONS OF LAW

The act of the Respondents violates Disciplinary Rule 2-101(B).

RECOMMENDATIONS

It is the recommendation of the committee that each of the Respondents be suspended from the practice of law for not less than six (6) months.

DONE by the Chairman for and on behalf of the committee (2) and with the concur-

rence of the members of the committee, this 8th day of April, 1976.

By Philip E. von Ammon  
Chairman

\* \* \* \*

SPECIAL LOCAL ADMINISTRATIVE COMMITTEE

OF THE

STATE BAR OF ARIZONA

FOR

DISTRICT NO: 4A

In the Matter of a Member )  
 ) No. 76-1-S16  
of the State Bar of Arizona )  
 )

RESPONDENTS' OBJECTIONS TO FINDINGS  
AND CONCLUSIONS OF ADMINISTRATIVE  
COMMITTEE  
(Filed April 23, 1976)

1. Pursuant to Rule 35(c)(4) of the Rules of the Supreme Court of Arizona, Respondents object to the recommendation of the administrative committee entered in the above matter on April 8, 1976. The objection is based upon the contention that Disciplinary Rule 2-101(B) and these proceed-

ings are invalid for reasons advanced by Respondents in the records of this proceeding. Objection is further made to the penalty recommended by the administrative committee.

2. Pursuant to Rule 36(b) of the Supreme Court of Arizona, Respondents request permission to appear by their attorney before the Board of Governors and be heard on matters relating to the recommended penalty in this proceeding.

3. Pursuant to Rule 33(d)(1), Respondents waive the privacy of these proceedings and request that these proceedings from their inception be considered a matter of public record.

Respectfully submitted this 23rd day of April, 1976.

By: William C. Canby, Jr.  
Attorney for Respondents

This original document delivered this 23rd day of April, 1976 to Philip von

Ammon, Esq. Copy of the same delivered this 23rd day of April, 1976 to John P. Frank, Esq.

By: Van O'Steen

\* \* \* \*

BEFORE THE BOARD OF GOVERNORS  
OF THE

STATE BAR OF ARIZONA

In the Matter of a Member of	)	
The State Bar of Arizona	)	
	)	
JOHN R. BATES and	)	No. 76-1-S16
VAN O'STEEN,	)	
Respondents.	)	
	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDATIONS  
(Filed April 30, 1976)

This matter having come on for full and final hearing on April 7, 1976 before the Special Administrative Committee of Ivan Robinette, Carl W. Divelbiss, and Philip E. von Ammon, Chairman, and the matter having been heard, evidence having been taken, and briefs having been submitted,

and the Board of Governors having reviewed the above matter on April 28, 1976, it is now determined and recommended by the Board as follows:

#### FINDINGS OF FACT

The Respondents, John R. Bates and Van O'Steen, did in fact cause an advertisement for their law office to be published in a Phoenix newspaper, as charged in the Formal Complaint and as admitted in the Answer.

#### CONCLUSIONS OF LAW

The act of the Respondents violates Disciplinary Rule 2-101(B).

#### RECOMMENDATIONS

The act of the Respondents was on one hand a deliberate and knowing violation of the Rule, but on the other hand was undertaken as an earnest challenge to the validity of a rule they conscientiously believe to be invalid. We therefore recommend a penalty of a one-week suspension

from the (2) practice of law for each of them, the weeks to run consecutively and not simultaneously, so as to avoid the closing down of their practice.

We further recommend that the enforcement of this discipline be suspended until 30 days after a final decision has been made concerning the validity of the rule in the highest court to which it is presented.

The foregoing Findings of Fact, Conclusions of Law, and Recommendations are issued by the Board of Governors this 30th day of April, 1976, pursuant to Rule 36(d) of the Rules of the Supreme Court of the State of Arizona.

By: Mark I. Harrison,  
President  
State Bar of Arizona

\* \* \* \*

SPECIAL LOCAL ADMINISTRATIVE COMMITTEE

OF THE

STATE BAR OF ARIZONA



In the Matter of a Member )  
 )  
Of the State Bar of Arizona )  
 )  
JOHN R. BATES and ) No. 76-1-S16  
VAN O'STEEN, )  
 )  
Respondents. )  
 )

Pursuant to Arizona Supreme Court Rule 36(d), Respondents BATES and O'STEEN object to the recommendation of the Board of Governors of the State Bar of Arizona entered in these proceedings on April 30, 1976.

By: William C. Canby, Jr.  
Attorney for Respondents

By: Van O'Steen

\* \* \* \*

The opinion of the Supreme Court of Arizona may be found in the Jurisdictional Statement beginning at page 1a.

\* \* \* \*

The notice of appeal may be found in the Jurisdictional Statement at page 19a.

Supreme Court, U. S.

FILED

SEP 7 1976

MICHAEL RODAK, JR., CLERK

IN THE

**Supreme Court of the United States**

October Term, 1976

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No. **76-316**

---

JOHN R. BATES and  
VAN O'STEEN,

Appellants,

v.

STATE BAR OF ARIZONA,

Appellee.

---

On Appeal From the Supreme  
Court of Arizona

---

APPELLEE'S MOTION TO AFFIRM

**ORME LEWIS**

**JOHN P. FRANK**

100 West Washington Street  
Phoenix, Arizona 85003

*Attorneys for Appellee*

**IN THE**  
**Supreme Court of the United States**

October Term, 1976

---

No.

---

**JOHN R. BATES and  
VAN O'STEEN,**

Appellants,

v.

**STATE BAR OF ARIZONA,**

Appellee.

---

On Appeal From the Supreme  
Court of Arizona

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IN THE  
**Supreme Court of the United States**

October Term, 1976

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No.

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JOHN R. BATES and  
VAN O'STEEN,

Appellants,

v.

STATE BAR OF ARIZONA,

Appellee.

---

On Appeal From the Supreme  
Court of Arizona

---

**APPELLEE'S MOTION TO AFFIRM**

Appellee moves to affirm on the ground that the case does not need further argument.

**STATEMENT OF THE CASE**

The substance of this matter is whether the American Bar Association ethical prohibition of lawyer advertising, adopted in essence by the Arizona Supreme Court as a rule under its indisputable rule making power, is valid. The rule was

challenged by a newspaper advertisement of the Appellants, a law firm. The Arizona Supreme Court has upheld the Rule. The questions are purely federal and have been raised at all points.

#### REASONS FOR AFFIRMING

The First Amendment question is so obviously substantial that we cannot in candor make the usual motion to dismiss. Four three-judge courts have taken jurisdiction of these questions, in each case illustrating substantiality. *Consumers Union of the United States, Inc. v. American Bar Association*, Civil No. 75-0105-R (E.D. Va., filed Feb. 27, 1975); *Consumers Union of the United States, Inc. v. Board of Governors, State Bar of California*, Civil No. C-75-2385 S.C. (N.D. Cal., filed Nov. 13, 1975); *Niles v. Lowe*, 407 F. Supp. 132 (D. Hawaii 1976); *Person v. The Association of the Bar of New York*, Civil No. 75-C-987 (E.D. N.Y., filed June 23, 1975). These appellants brought suit in the United States District Court for the District of Arizona and made application for a three-judge court. That case was assigned to the Honorable Leland Neilsen, San Diego. We are authorized to state that Judge Neilsen held the matter under advisement pending the decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 96 S. Ct. 1817 (1976), and then abstained from calling in a three-judge court on agreement of counsel that the matter had progressed so far in the state system as to make it unproductive to involve the federal district court further. Finally, footnote 25 in the *Virginia Pharmacy* case would make the question substantial if there were nothing else.

If this Court wishes to give plenary treatment to the

question, the instant case will do as a vehicle. The case has been handled throughout with full realization that it would be the first case here squarely to present this problem in the new era; the record is good.

But for reasons set forth by the Chief Justice in his concurrence in the *Virginia Pharmacy* case, 96 S. Ct. at 1831, followed by the court below, this Court may conclude that there is no need for more talk. So far as free speech is concerned, this case can be affirmed on the authority of the Chief Justice's opinion and the cases cited therein. So far as the antitrust argument is concerned, this state regulation is permitted under *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943). If this is anti-competitive action at all, it is "compelled by the State acting as a sovereign," *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791, 95 S. Ct. 2004 (1975), quoted with approval in the plurality opinion, *Cantor v. Detroit Edison Co.*, n.28, No. 75-122, July 6, 1976. In the circumstances, we suggest that if probable jurisdiction should be noted, it be confined to Question One of the Appellants' Questions Presented, since there is surely nothing new to say as to the second Question.

#### CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

Orme Lewis  
John P. Frank  
100 West Washington Street  
Phoenix, Arizona 85003  
Attorneys for Appellee

August, 1976.

FILED

NOV 17 1976

MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

---

No. 76-316

---

JOHN R. BATES and VAN O'STEEN,

*Appellants,*

—v.—

STATE BAR OF ARIZONA,

*Appellee.*

---

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

---

**BRIEF FOR THE APPELLANTS**

---

WILLIAM C. CANBY, JR.  
413 E. Loyola Drive  
Tempe, Arizona 85282

MELVIN L. WULF  
*American Civil Liberties  
Union Foundation*  
22 East 40th Street  
New York, N.Y. 10016

*Attorneys for Appellants*

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IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1976

No. 76-316

JOHN R. BATES and VAN O'STEEN, Appellants,  
v.  
STATE BAR OF ARIZONA, Appellee.

On Appeal From The  
Supreme Court of Arizona

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the Supreme Court of  
Arizona is not yet reported. It appears  
as Appendix A to the jurisdictional  
statement (pp. 1a -18a).

## JURISDICTION

The order of the Supreme Court of Arizona was entered on July 26, 1976. Notice of appeal was filed on July 28, 1976. The jurisdictional statement was filed on September 1, 1976. Probable jurisdiction was noted on October 4, 1976. The jurisdiction of this Court is based upon 28 U.S.C. 1257(2).

## QUESTIONS PRESENTED

1. Does a total ban upon advertising by private attorneys, enforced by an integrated state bar and state supreme court, violate the First Amendment?

2. Does such a ban, originated by the American Bar Association and incorporated into a rule of the Arizona Supreme Court, violate the Sherman Act notwithstanding the state-action exemption doctrine of Parker v. Brown, 317 U.S. 341 (1943)?

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Disciplinary Rule 2-101(B), of which the validity is in question here, is embodied in Rule 29(a) of the Supreme Court of Arizona, Ariz. Rev. Stat. Vol. 17A, Supp. p. 23. It provides as follows:

DR 2-101

(B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf. However, a lawyer recommended by, paid by, or whose legal services are furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits. This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.

- (2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.
- (3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.
- (4) In and on legal documents prepared by him.
- (5) In and on legal textbooks, treatises and other legal publications, and in dignified advertisements thereof.
- (6) In communications by a qualified legal assistance organization, along with the biographical information permitted under DR 2-102(A)(6), directed to a member or beneficiary of such organization.

The First Amendment and pertinent provisions of the Sherman Act and of the Rules of the Arizona Supreme Court are reproduced in the appendix to this brief. (App. pp. 1a-6a infra).

## STATEMENT

### A. FACTS

#### Appellants' practice

Appellants John R. Bates and Van O'Steen are attorneys licensed to practice in the State of Arizona. Both are 1972 graduates of Arizona State University College of Law. Mr. Bates was selected by the faculty of that institution as the outstanding student of his class; Mr. O'Steen was graduated cum laude. (A. 220-21).<sup>1</sup> After admission to the Bar in September 1972, they both practiced as attorneys with the Maricopa County (Arizona) Legal Aid Society for a year and a half. (A. 221).

In March 1974, appellants left the Legal Aid Society and established a private practice in Phoenix under

<sup>1</sup>References to the single printed Appendix are denoted "A. ". References to the appendix of this brief and of the jurisdictional statement are denoted, respectively, "App. p. ", infra and "Juris. St. App. p. ". References to the transcript of hearing in the original record are denoted "Tr. ".



the name of the Legal Clinic of Bates and O'Steen. (Tr. 154). The practice is a highly unusual one; it was established as a conscious effort to provide legal services of good quality to persons of low and moderate income who did not qualify for governmental legal aid and who consequently had difficulty finding lawyers at prices they could afford. (A. 75). This portion of the public is now the group least served by the legal profession. (Exh. 3; A. 22, 289, 305-06). Typically, appellants' clients have ranged from those on welfare to a very few with a family income over \$25,000. (A. 81-82). In nearly 50 instances, appellants have served needy clients without fee. (A. 222). The rest they have served at modest fees suitable for persons of moderate or limited income.

To enable such service, appellants have imparted certain characteristics of a legal clinic to their firm which cumulatively distinguish it from the usual private law firm. Each attorney within the firm specializes, and maximum use is made of paralegals so that the

attorneys' expertise is brought to bear in the most efficient way. (A. 76). Paralegal personnel are not, of course, allowed to give legal advice or represent clients in court, but they are used for many tasks which attorneys perform in other offices but which really do not call for a lawyer's expertise. (A. 76).

Appellants have also used a "systems approach" to their practice, in which many repetitive tasks are put together by attorneys into systems which can then be operated by paralegals. Clerical work is reduced by the use of forms, many of which are of appellants' own design, and by use of automatic typewriting equipment. (A. 78-79, 115). While such a systems approach and use of paralegals may be common in large firms engaged in commercially-oriented practice, they are quite unusual in firms serving the moderate-income clientele of the appellants. (A. 79-81 ). In addition, appellants do not maintain a substantial collection of law books; they use institutional libraries for research. (A. 79).

Appellants' practice is specialized not only between the lawyers in the firm, but also in the cases the firm as a whole accepts. While not all of the categories of cases accepted by appellants fit a pattern, the emphasis is very clearly upon matters of a routine nature that suits them particularly well to a cost-saving systems approach. The types of cases which appellants accept are uncontested divorce and other domestic relations matters; adoptions; guardianship and conservatorship; individual bankruptcies; wills; probates; changes of name; personal injury matters; and some consumer contract and real estate work. (A. 71-72). Appellants would not, for instance, accept a complicated medical malpractice case, and they do not accept contested divorces. (A. 114, 97). Potential divorce clients who have not reached agreement with their spouses on the terms of the divorce are referred to the Maricopa County Lawyer Referral Service. (A. 97). Appellants do not do criminal work. (A. 72). Appellants' final and most important cost-saving device from the standpoint of the client

is that they make a relatively low profit on each case they handle. (A. 79,83). The total approach of appellants' practice consequently depends for its economic viability on substantial volume. (A. 122-23).

#### The advertisement

After conducting their practice in this manner for two years, appellants concluded that their practice and the clinical concept in general could not survive unless the availability of legal services at low cost was generally advertised. They also concluded that this could not be done without the advertisement of fees. (A. 120-23). Consequently, on February 22, 1976, appellants caused an advertisement to be published in the Arizona Republic, a major daily newspaper for the Phoenix metropolitan area. The advertisement stated the availability of appellants' services at reasonable fees, and set forth fees for certain services, such as \$175.00 plus \$20.00 filing fee for an uncontested divorce. (Exh. 6; A. 24, 409).

Appellants' immediate motive in placing the advertisement was, of course, to increase the volume of their practice and make it economically viable. But they were also motivated by a desire to help create a better system of delivery of legal services to persons in need of them who might not otherwise obtain them. (A. 123). During the period from the publication of the advertisement to the day before the initial hearing in this proceeding, appellants opened files for 74 new clients. In the comparable period just prior to the advertisement, they opened 37. (A. 235-36). Forty of the new clients accepted after the advertisement filled out a form indicating why they had come to appellants; 24 of those indicated that it was because of the advertisement or the newspaper. (A. 225-27; Exh. 17, A. 230, 586). Because of contemporaneous news stories prominently featuring the fact that appellants had advertised, it is not possible to determine with exactitude whether those 24 clients were attracted by the advertisement, the news stories, or both. (A. 228-29).

### Economic effects of price advertising

One of the rare facts upon which virtually all economists agree is that price advertising is pro-competitive and has the effect of decreasing prices. (A. 187-88). The advertisement placed by the appellants is a classic example of such price advertising. (A. 192); Exh. 6, A. 24, 409). By making more information available to the consumer, price advertising contributes to a system of workable competition which enables the consumer to obtain goods or services at the lowest price consistent with the continued operation of the provider. (A. 173-76). There is nothing to indicate that increased competition leads to a decrease in quality of goods or services; experience points instead to an improvement in quality. (A. 194-96; 210-11).

Conversely, a ban upon advertising tends to increase prices without improving quality. This tendency is confirmed by studies on the retailing of prescription drugs and eyeglasses -- the only subjects permitting comparison between states allowing free advertising and



others prohibiting it in various degrees (A. 177, 182-83; Exhs. 13, 14). For example, after correction for all other distinguishing factors, drug prices remained 5% higher in states with advertising bans than in those without. (A. 178; Exh. 13). For eyeglasses, the difference was \$5 to \$6 on a pair of glasses costing from \$30 to \$40, and, at the extreme, eyeglasses in the state having the most severe prohibition of advertising sold for \$19 per pair more than in the state having the least restrictions upon advertising. (A. 183-84; Exh. 14). The lower prices prevailing in states with advertising were attended with just as high levels of service and quality as those which existed in the higher price, non-advertising states. (A. 180-82; 184-86).

A comparable study cannot yet be done in relation to legal services because of the uniformity of the ban on general public advertising by lawyers (A. 188-90). Nevertheless, expert opinion supports the view that price advertising in the legal profession would

similarly increase competition with the effect of lowering prices while maintaining or improving quality. (A. 192-94; 210-11). Newspaper advertising will have a greater competitive effect than the mere furnishing of fee information upon request at the lawyer's office, because placing the burden of seeking information on the consumer increases the cost of obtaining that information and makes more difficult the comparison of lawyers' fees. (A. 217-18).

#### The prohibition against advertising

Like Canon of Ethics 27 which preceded it, the present prohibition against advertising, Disciplinary Rule 2-101(B), was originally adopted by the American Bar Association, in which the State Bar of Arizona is represented. (Exh. 5, A. 23, 353-54). DR 2-101(B) was subsequently adopted by the Supreme Court of Arizona with minor modifications of grammar and cross-references.<sup>2</sup> (Exh.

<sup>2</sup> The ABA version of DR 2-101(B) permits certain institutional advertising by legal services organizations specified

5, A. 23, 352-53). It applies to all members of the State Bar of Arizona, an integrated bar. All members are also generally subject, by court rule, to the "duties and obligations ... prescribed by the Code of Professional Responsibility of the American Bar Association, as amended by [the Arizona Supreme] Court." Ariz. Sup. Ct. Rule 29(a).<sup>3</sup>

in DR 2-103(D)(1)-(5). The Arizona Supreme Court version omits that cross-reference and permits institutional advertising by "qualified legal assistance organization[s]." *Supra*, p. 3.

<sup>3</sup>The 1975 amendments to the Code of Professional Responsibility by the American Bar Association relaxed the rules against advertising by individual attorneys only to the extent of permitting limited advertising (including advertisement of an initial consultation fee only) in classified sections of telephone directories or directories published by bar associations. 62 A.B.A.J 309 (1975). The amendment is not in effect in Arizona or most other states, and would not in any event permit advertisement of fees for specific services or advertisement in mass media such as that engaged in by appellants. It should also be noted that price advertising is not permitted by the publishers of the classified "yellow

A ban on general public advertising has not only been adopted by lawyers' professional associations (Exh. 5, A. 23, 352; Exh. 3, A. 22, 284-85), it has also been a matter of agreement among several other professions, whether or not the ban is enforced with the aid of a state agency. Associations of medical doctors, certified public accountants, and architects include in their ethical codes prohibitions of general public advertising by individual practitioners. (Exh. 4, A.23, 311; A. 35-36; Exh. 7, A. 25, 410; A. 150). Some of the professions employ even more direct means of restricting price competition. The Maricopa County Bar Association maintained and circulated a schedule of suggested minimum fees until two or three years ago. (Exh. 5, A. 23, 355). The American Institute of Certified Public Accounts had a rule against competitive bidding until the Justice Department made them eliminate it (A. 59), and a similar rule

pages" section of most telephone directories. Current Developments in Professional Responsibility 1-1 (Mar. 1976).

was enforced by the Arizona State Board of Accountancy until the Attorney General of Arizona issued an opinion that it violated the federal and state anti-trust laws. (A. 56-57; Exh. 11, A. 56, 449). Architects, whose ethics are enforced by their private association, are permitted to solicit clients in person but their ethics prohibit competing with other architects on the basis of price. (A. 161).

Various justifications are put forth in the record for prohibitions against professional advertising. Some are primarily internal to the professions, such as the contention that advertising would impair the dignity of a profession (Exh. 3, A. 22, 287-88; A. 44), or would favor firms with greater financial resources (Exh. 3, A. 22, 293-94). Other justifications directly concern the public, such as the argument that advertising is likely to be misleading. (Exh. 5, A. 23, 376-78; Exh. 3, A. 22, 291-92; A. 152). However, there is not anywhere in the record any indication that appellants' advertisement has misled anyone, or that their services were not

performed competently for the fees advertised. A further justification offered for prohibiting price advertising is that if a fixed fee is advertised, unexpected complications in some cases such as uncontested divorces will cause the attorney to depart from his pre-set fee or alternatively to refrain from performing work which competent disposition of the case requires. (Exh. 5, A. 23, 376-80). Yet many attorneys quote fixed fees for uncontested divorces over the telephone (Exh. 5, A. 23, 405; A. 238-40), and the prepaid legal services plan sponsored by the State Bar itself sets forth a schedule of fees for certain services to which the participating attorney agrees to limit himself. That plan, for instance, sets \$250 for an uncontested dissolution of marriage, \$225 for an individual nonbusiness bankruptcy, and \$300 for husband-wife joint nonbusiness bankruptcy. (Exh. 12, A. 168, 471-73). The theory of such a fixed-fee plan is that if cases occasionally turn out to involve more work than anticipated, the majority will not, and the set fee will average out properly when spread



over all the cases. (Exh. 5, A. 23, 407-08). The same principle applies to contingent fees. (Exh. 3, A. 22, 303-04). But testifying attorneys agree that the true professional does competent work whether he is getting paid for his efforts on a particular case or not. (Exh. 5, A. 23, 404-05; Exh. 3, 22, 304).

#### Interstate commerce

The members of the State Bar of Arizona as a group substantially affect interstate commerce in their own practices and in services to clients whose activities affect interstate commerce. (Exh. 5, Record, pp. 10-11). Appellants in their practice have concluded 73 cases which involved interstate elements such as parties or creditors in other states or negotiation with out-of-state insurers. (Tr. 154-158; Exh. 16). Their practice also uses substantial amounts of supplies and services furnished in interstate commerce. (Tr. 158-161). At least 2000 copies of the advertisement which is the subject of this proceeding

were distributed in other states as part of the regular circulation of the Arizona Republic. (Stip., A. 587).

#### The proceedings below

As a result of their advertisement, appellants were charged by the State Bar of Arizona on March 2, 1976 with violation of DR 2-101(B). The matter was heard by a Special Local Administrative Committee of the State Bar on April 7, 1976. The Committee took the position that it was empowered only to determine whether the Rule had been violated and to recommend a penalty, but it permitted a full record to be made as a foundation for an attack on the validity of the Rule before higher tribunals. On April 8, 1976, the Committee found that appellants had violated the Rule and recommended that each of them be suspended from the practice of law for not less than six months. (A. 588)

The matter was reviewed by the Board of Governors of the State Bar on April 28, 1976. On April 30, 1976, the Board adopted the findings of the Committee but recommended that each of the appellants be suspended for one week

only, the suspension to be served consecutively. (A. 592-94).

The matter was then submitted to the Supreme Court of Arizona upon briefs and upon the record made before the Administrative Committee and the Board of Governors. On July 26, 1976, that Court ruled that appellants had violated DR 2-101(B). The Court rejected appellants' contentions that DR 2-101(B) was invalid under the First Amendment as construed by this Court in Bigelow v. Virginia, 421 U.S. 809 (1975) and Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S. Ct. 1817 (1976). It further rejected appellants' argument that DR 2-101(B) violated Sections 1 and 2 of the Sherman Act, holding that the Rule was immunized from the reach of the Sherman Act by the state action exemption set forth in Parker v. Brown, 317 U.S. 341 (1973).<sup>4</sup> The Court also suggested that it was

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<sup>4</sup> The Arizona Supreme Court did not cite this Court's decision in Cantor v. Detroit Edison Co., 96 S. Ct. 3110 (1976), but the Cantor decision had been furnished to that Court as soon as it was

not subject to the interference of the legislative branch, "state or federal", in its regulation of the practice of law.

Justice Holohan dissented, stating that the ban on advertising violated the First Amendment, including the right of the public to know, and that it should not be adhered to in the face of contrary national antitrust policies. He also contended that prohibiting newspaper advertisement while permitting advertisement in sanctioned law lists violated equal protection.

The penalty imposed upon appellants by the Supreme Court of Arizona was that of censure, which was ordered in its opinion. The censure was stayed by Mr. Justice Rehnquist on August 5, 1976, pending final determination of the matter by this Court.

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available two weeks before the decision below. The arguments in this brief now supported by Cantor were briefed and submitted to the Court below prior to the decision in Cantor, and the pendency of Cantor was noted in appellants' brief.

## SUMMARY OF ARGUMENT

Appellants' advertisement was an essential element in their system of delivery of legal services at low cost to a portion of the public now largely unserved by the legal profession -- those of moderate means. Prohibition of the advertisement violates both the First Amendment and the federal antitrust laws.

I. Disciplinary Rule 2-101(B) Violates the First Amendment on its Face and as Applied to Appellants.

Disciplinary Rule 2-101(B) severely restricts commercial speech, which is now firmly established as a subject of First Amendment protection. Bigelow v. Virginia, 421 U.S. 809 (1975); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S. Ct. 1817 (1976). DR 2-101(B) is accordingly invalid unless the state shows it to be necessary to serve an extremely important state interest which outweighs the public interest in speech, and which

could not be served by a more narrowly drawn regulation. The state has made no such showing here.

The First Amendment interests favoring appellants' advertising are overwhelming. Commercial speech is protected because of its importance to individual economic decision-making, upon which depends the proper allocation of resources in a free market economy. Virginia State Board of Pharmacy, 96 S. Ct. at 1827. In stating fees for specific services, appellants' advertisement provided the type of economic information most useful for consumer decision-making, information "as to who is producing and selling what product...and at what price". Id. The public need for such information is immense; tens of millions of Americans do not know how to find a lawyer and are afraid they cannot afford one. Disciplinary Rule 2-101(B) discriminates against the dissemination of information addressed to this group, which lacks the knowledge of lawyers easily available to commercial clients, and in so doing violates the First Amendment. Cf. Police Dept. of Chicago



v. Mosley, 408 U.S. 92 (1972).

Appellants' right to advertise is also buttressed by the independent constitutional right of their potential clients to obtain legal services, NAACP v. Button, 371 U.S. 415 (1963), as well as their First Amendment right to receive information.

No important state interest supports the prohibition of Disciplinary Rule 2-101(B). A desire to avoid barratry is simply insufficient reason to keep millions of people ignorant of the cost and availability of legal services; the organized bar recognizes as much in its program of institutional advertising.

Nor is there any support for the suggestion that attorneys who advertise fixed fees will reduce quality when a case turns out to be unexpectedly complicated. The argument is wholly undercut by the State Bar's own prepaid legal services program, in which attorneys agree in advance to fixed fees.

Problems of deceptive advertising, like those of quality, can be dealt with by direct means more narrow than a total prohibition of advertising. There

is no showing that all attorney advertising is inherently misleading, or that appellants' advertising was. Appellants performed their services competently and adhered to the advertised fees. The Rule is fatally overbroad.

All of the justifications offered by the State share the characteristic condemned in Virginia State Board of Pharmacy, 96 S. Ct. at 1829: they purport to protect the public by keeping it in ignorance. They consequently do not support Disciplinary Rule 2-101(B) against a First Amendment challenge.

## II. Enforcement of Disciplinary Rule 2-101(B) Against Appellants Violates the Sherman Act.

The Sherman Act's prohibition of restraints of trade extends to the legal profession, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), and an agreement not to advertise prices is a per se violation of the Act. United States v. Gasoline Retailers Ass'n, Inc., 285 F.2d 688 (7th Cir. 1961). Disciplinary Rule 2-101(B) constitutes such

an agreement, and the Supreme Court of Arizona erred in holding that it was exempt from the antitrust laws under the state action doctrine of Parker v. Brown, 317 U.S. 431 (1943).

This Court recently defined the limits of the Parker "exemption" in Cantor v. Detroit Edison Co., 96 S. Ct. 3110 (1976). There it was held that a regulated power company's practice of supplying free light bulbs violated the Sherman Act even though the policy had been approved by a state agency and the company was not free under state law to deviate from it. In rejecting the company's Parker defense, this Court ruled: (1) that a privately initiated restraint is not withdrawn from the Sherman Act by its embodiment in a state command; and (2) that pervasive state regulation of an industry did not give rise to an antitrust exemption unless the exemption was necessary to make the regulatory scheme work. It also indicated (3) that even in cases of direct conflict, the federal interest need not inevitably be subordinated to that of the state. All three elements

are applicable to the present case, and require reversal of the decision below.

1. Disciplinary Rule 2-101(B) originated with the American Bar Association with the participation of the State Bar of Arizona, an integrated bar association similar to the one held subject to the antitrust laws in Goldfarb, supra. It was subsequently adopted by the Arizona Supreme Court. Since the bar association exercised a high degree of individual choice in privately initiating the ban upon advertising, the prohibition violates the Sherman Act despite its adoption into a state regulation of binding effect. Cantor, 96 S. Ct. at 3118-19. That being the case, the state may not now enforce its command to violate the antitrust laws. Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 389 (1951).

2. The ban upon advertising is clearly not necessary to make Arizona's general regulation of the practice of law work. Advertising will not affect state control of the admission of attorneys to



practice or the enforcement of the great majority of disciplinary rules governing their conduct. Protection of the public from deception can be achieved by means other than a prohibition of all attorney advertising.

3. In any event, the federal interest in encouraging competition greatly outweighs the state interest in suppressing advertising. Attorney advertising of the cost and availability of legal services will increase the volume of practice to permit economies of scale, keep fees reasonably low, and will stimulate innovation in the delivery of legal services. The countervailing interests of the state are insufficient to overcome the federal policy of competition for the same reasons that they fail to justify an intrusion upon First Amendment interests. A state action exemption is particularly unjustified in the present case because it would largely eliminate price competition without substituting any system of fee regulation to counteract excesses likely to attend monopoly power. State interests accordingly do not justify the subordination of

federal policy, and Disciplinary Rule 2-101(B) is invalid because it conflicts with the Sherman Act. No principle of separation of powers or federalism protects the Rule from such invalidation.

#### ARGUMENT

#### I. DISCIPLINARY RULE 2-101(B) VIOLATES THE FIRST AMENDMENT ON ITS FACE AND AS APPLIED TO APPELLANTS

##### A. Appellants' advertisement is protected expression.

Although it raised fundamental issues concerning the delivery of legal services to the public, appellants' advertisement in the Arizona Republic was on its surface simple commercial expression; it offered specified services at stated fees. Whatever may have been the status of commercial speech in the past, it is now established beyond argument that it enjoys First Amendment protection. Bigelow v. Virginia, 421 U.S. 809 (1975); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S. Ct. 1817 (1976). This protection applies under the Fourteenth Amendment against action by



the states. Schneider v. State, 308 U.S. 147, 160 (1939). Traditionally, the state bears a very heavy burden of justification when it impinges upon a First Amendment interest. NAACP v. Button, 371 U.S. 415, 438-39 (1963); Dunn v. Blumstein, 405 U.S. 331, 342-43 (1972). At the very least, it is necessary in cases of commercial speech to "[assess] the First Amendment interest at stake and [weigh] it against the public interest allegedly served by the regulation." Bigelow v. Virginia, supra at 826. The balance in the present case is overwhelmingly in favor of appellants' expression.

1. Appellants' advertisement of fees for certain services is precisely the type of advertising most affected with a First Amendment interest.

In Virginia State Board of Pharmacy, supra, this Court held that a statute prohibiting the advertisement of prescription drug prices violated the consumers' First Amendment right to receive economic information. Arguments of the Board of Pharmacy that the

admittedly important professional responsibilities of pharmacists necessitated the prohibition were rejected, for "[t]he advertising ban does not directly affect professional standards one way or the other." 96 S. Ct. at 1829. The Court necessarily refrained from deciding to what degree First Amendment protection of commercial speech extended to attorney advertising, 96 S. Ct. at 1831, n. 25. But the rationale of the decision and the important public policies underlying it clearly establish that appellants' advertisement contains exactly the kind of commercial message most entitled to the benefits of the First Amendment.

The First Amendment interest in commercial speech stems from the central role of economic information in the allocation of resources in a free market economy. Virginia State Board of Pharmacy, 96 S. Ct. at 1827; see Redish, Commercial Speech and Free Expression, 39 Geo. Wash. L. Rev. 429, 432-48 (1971). It is crucial to this role, and highly important to the individual consumer in his decision-making, that there be

dissemination of information "as to who is producing and selling what product, for what reason, and at what price." Virginia State Board of Pharmacy, 96 S. Ct. at 1827. Appellants' advertisement contained precisely this type of concrete economic information; it informed the potential client what legal services would be rendered by what attorneys and for what fee. The fee information in particular contributes to the proper functioning of a competitive market. (A. 187-88).

The public need for information regarding attorneys' services and fees is immense. A final report of survey by the American Bar Association Special Committee to Survey Legal Needs, to be published in December 1976, documents the fact that tens of millions of Americans of moderate means who have legal problems and know it do not seek legal counsel, because they do not know how to find a lawyer and they are afraid that they cannot afford one. Am. Bar News, Mar. 1976, p. 8. See B. Curran & F. Spalding, The Legal Needs of the Public 85-86 (Am. Bar Found. Prelim.

Rept. 1974).

Fee advertising is of great interest to the individual consumer, particularly retired persons on fixed incomes. (A. 134, 139). It is common knowledge that legal fees vary widely; it is not common knowledge what those variations are or who charges which fees. Appellants' advertised fee for an uncontested divorce is \$175; the fee authorized for that service by a lawyer enrolled in the State Bar's prepaid services plan is \$250. (Exh. 12; A. 168, 473). Appellants' advertised fee for preparing all of the papers and instructing persons how to obtain their own uncontested divorces -- a service not likely to be known by the public to be available -- is \$100. Appellants fee for uncontested nonbusiness joint bankruptcy is \$300. Federal court records for such bankruptcies filed in Phoenix during June 1976 indicate fees ranging from \$300 to \$600.<sup>5</sup> E.g., In re Renfro, B-1038, 1039 (D. Ariz. 1976);

<sup>5</sup> The possibility exists that some variation in fees is due to the performance of additional services. If so, that fact is also of importance to the consumer and can be advertised.

In re Cabrera, B-76-1044, 1045 (D. Ariz. 1976). Fee information is consequently very significant to the consumer; in many cases, particularly those involving relatively standardized services, the fee is the single most important factor. In publishing their fees, appellants directly serve the purposes of the First Amendment and are entitled to its protection.

2. The discriminatory effect of the Disciplinary Rules regarding advertising amounts to content regulation in violation of the First Amendment.

Disciplinary Rule 2-101(B) operates with a discriminatory impact upon that great majority of the public that has little contact with lawyers. A ban upon public advertising may have caused little damage to the average person in the small-town conditions that prevailed in most of the country into this century; people in each community knew their local lawyers and knew something about them. They may well have known generally what those lawyers charged for their services. But in the modern urban setting,

the only group which typically knows of its need for legal services, knows attorneys who can satisfy those needs, and knows something of their competence and their fees, is the community of substantial commercial clients who provide the bulk of practice of the typical urban large law firms. B. Christensen, Lawyers for People of Moderate Means 130 (Am. Bar Found. 1970); J. Auerbach, Unequal Justice 42 (1976). As a consequence, the purportedly neutral ban upon advertising becomes in effect a form of content regulation which discriminates against messages directed toward persons of moderate or low income. See Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 36-37 (1975).

The problem of discriminatory impact of Disciplinary Rule 2-101(B) is made more acute by a fact pointed out by Justice Holohan in his dissent below: attorneys are permitted certain kinds of advertising in "reputable law lists". Disciplinary Rule 2-102(A)(6) (App. 5a, infra.) permits the listing of scholastic honors, legal authorships,



and, with their consent, clients regularly represented. A law list is conclusively established as reputable if it is certified by the American Bar Association, a service for which the publisher pays a fee. (Exh. 5, A. 23, 406-07). These law lists are not, however, easily available to the general public. While some may be in public libraries, the bulk are distributed to lawyers and to institutional recipients in the commercial world. (Exh. 5, A. 23, 406). In this respect as well, the State Bar's regulation of advertising is particularly restrictive of the flow of information to the large noncommercial public which is most in need of it. See. D. Rosenthal, *Lawyer and Client: Who's in Charge?* 138-39 (Russell Sage Found. 1974). The prohibition of appellants' advertising of fee information in newspapers of general circulation is accordingly part of a system which discriminates against certain kinds of messages in violation of the First Amendment. Cf. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972).

3. Appellants' right to advertise is supported by the constitutional right of consumers to legal services.

Consumers have their own First Amendment right to receive information. *Virginia State Board of Pharmacy, supra; Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972). But there is a more particular interest which militates heavily in favor of affording First Amendment protection to attorney advertising. Advertising is an essential element in extending legal services to those who are now unserved. The organized Bar recognizes as much in its programs of institutional advertising,<sup>6</sup>

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<sup>6</sup>The Maricopa County Bar Association reports in regard to its Lawyer Referral Service: "[A]n aggressive advertising campaign will be launched to inform and educate the public with regard to the availability of legal help at a reasonable cost. In the June issue of the ABA Journal, two cities of the same size were compared in effectiveness of their referral services. Hackensack, which did not advertise, made 692 referrals in 1974; Columbus, which did advertise made 7,830 referrals, more than 10 times

as does Disciplinary Rule 2-101(B) in permitting advertising by qualified legal assistance organizations. The services which appellants are advertising are ones to which consumers have an independent right under the First and other Amendments. NAACP v. Button, 371 U.S. 415 (1963); Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar, 389 U.S. 217 (1967). Appellants are therefore entitled to protection in their advertising because their "...First Amendment interests [coincide] with the constitutional interests of the general public". Bigelow v. Virginia, 421 U.S. at 822. Appellants' interests coincide as well with the command of Canon 2 of the Code

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that of Hackensack. What happens in Phoenix remains to be seen, but we are optimistic." Maricopa County Bar Ass'n Newsletter, Oct. 1976, p. 1. The Lawyer Referral Service advertises a \$10 fee for initial consultation, but does not advertise what fees will be charged for specific services, nor which lawyer will perform them.

of Professional Responsibility, which requires the lawyer to assist the profession in making legal counsel available.

Appellants' motives in placing the advertisement were concededly economic as well as altruistic. But even if their motives were purely economic, that would not disqualify them from First Amendment protection. Virginia State Board of Pharmacy, 96 S. Ct at 1826. In the present case, however, the economic motives are inseparable from the public purposes. The public need for legal services at low cost is great, and efficient organization of high-volume practices is a promising path toward their provision. Q. Johnstone & D. Hopson, Jr., Lawyers and Their Work 543-45 (1967); N.Y. Bar Found., A Lawyer at a Price People Can Afford (1975); Comment, Bar Restrictions on Dissemination of Information about Legal Services, 22 U.C.L.A. L. Rev. 483, 497-501 (1974). Advertising is a primary means of producing that volume, and of permitting the economies of scale which make the provision of low-cost services modestly profitable. (A. 122-25). See FTC

v. Proctor & Gamble Co., 386 U.S. 568, 603 (Harlan, J. concurring). And the harsh fact is that if the widespread provision of legal services at low cost to persons of moderate means is not allowed to become modestly profitable, it will not be done at all.

B. No important state interest justifies the suppression of appellants' advertisement.

The usual burden of justification placed upon the state when its otherwise legitimate regulations impinge upon First Amendment expression is that the constraint must be necessary to the furtherance of a compelling state interest. See NAACP v. Button, 371 U.S. 415, 438-39 (1963); Dunn v. Blumstein, 405 U.S. 331, 342-43 (1972). In addition, the state must show that the restriction of speech is drawn as narrowly as possible and that no less restrictive means of regulation will suffice. Shelton v. Tucker, 364 U.S. 479, 488-90 (1960); Talley v. California, 363 U.S. 60, 62-64 (1960). In view of the public importance of the economic information conveyed by

attorney advertising, the same standard of review is appropriate here, at least as to advertising which is not false or deceptive. But even if some lesser standard of review is applicable to commercial speech, it is clear from Bigelow v. Virginia and Virginia State Board of Pharmacy, *supra*, that it is incumbent upon the state to demonstrate a very important interest which clearly outweighs the opposing interest in free speech. This the state has wholly failed to do.

It was argued below that appellants' advertisement constituted barratry. But a general prejudice against fostering litigation, however longstanding, is simply not sufficient justification for perpetuating the inability of millions of members of the public to know how to find a lawyer. The fact that many people do without legal services because the profession does not sufficiently reach out to them is regarded in most circles as an embarrassment to the Bar, not a reason for pride. See B. Christensen, Lawyers for People of Moderate Means 128-172 (Am. Bar Found. 1970). The



constitutional right of the individual to obtain legal services has on several occasions been held by this Court to outweigh traditional proscriptions upon barratry, or running and capping. NAACP v. Button, 371 U.S. 415 (1963); Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar, 389 U.S. 217 (1967). Nor is it at all clear why appellants' advertisement should constitute forbidden barratry when advertising by qualified legal assistance organizations or by County Bar Lawyers Referral Services are not. See Disciplinary Rule 2-101(B); footnote 6, supra. The publishing of information which enables a person who needs a divorce or relief in bankruptcy to obtain it simply cannot be counted a social evil. The bringing of wholly groundless suits is an entirely different matter, and is properly punishable. Disciplinary Rules 2-109; 7-102. There is no suggestion in the record that appellants have been guilty of that practice, nor that their advertisement encourages it.

The intimations in the record that the quality of services might decline if advertising were permitted (Exh. 5, A. 23, 376-78) do not withstand scrutiny. The proposition that an attorney who has advertised a fixed fee will cut quality when he runs up against an unexpectedly complicated case is utterly refuted by examples of high quality work done by attorneys when no fee or a low fee is involved. (Exh. 5, A. 23, 404-05). And it is wholly undercut by the fixed-fee schedule of the State Bar's own prepaid legal services program. (Exh. 12, A. 168, 459). If some attorneys are inclined to cut quality in order to protect or increase their profits, they can and will do that whether or not they advertise and whether or not they quote a fixed fee in advance. See Virginia State Board of Pharmacy, 96 S. Ct. at 1829. There are less drastic means of handling the problem of inadequate quality than by banning all public advertising. See Disciplinary Rule 6-101.<sup>7</sup> Most important,

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<sup>7</sup>The Supreme Court of Arizona, in adopting the Code of Professional Responsibility, omitted DR 6-101(A)(1) which

the entire question of quality has nothing to do with this case. There is not a hint in the record that appellants' services were not of good quality. On the contrary, the systematization of their practice tends to eliminate all-too-common errors such as omitting, in divorce settlements, consideration of life insurance for the parent liable for child support. (A. 118). Far from being narrowly tailored to the objective of insuring quality, the ban against public advertising is wholly irrelevant to that objective.

Another justification offered for the prohibition of advertising by attorneys is that it "can be inherently misleading". (Exh. 5, A. 23, 376; see also Exh. 3, A. 22, 291-92; Opinion

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prohibits an attorney from handling a matter he knows he is not competent to handle, without associating one who is competent. That provision is nevertheless available as an alternative to prohibiting advertising. The Supreme Court of Arizona did adopt DR 6-101(A)(2) and (3), prohibiting a lawyer from handling a matter without adequate preparation and from neglecting a matter entrusted to him. Ariz. Sup. Ct. Rule 29(a).

below, Juris. St. App. 7a, 8a, 12a). There is no empirical support, however for such an assumption. It is true that attorneys' services are more varied than those of pharmacists, but that does not render attorneys' advertising innately deceptive. Some services, such as those advertised by appellants, are relatively standardized and attorneys commonly set a fixed fee for them. Others are sufficiently unpredictable that most lawyers simply advise clients that a stated hourly rate will be charged. There is no reason why those fixed fees or hourly rates and the services to which they pertain become misleading when they are advertised instead of being quoted to the client in person or over the telephone (A. 238-40), so long as the advertised arrangements are adhered to.

There is, moreover, no explanation why the advertisement of lawyers' services to the general public is assumed to be misleading while advertising of those same services to beneficiaries of a closed-panel prepaid legal services plan, permitted by DR 2-101(B) and DR 2-103(D),

apparently is not. Furthermore, it is inconsistent with the First Amendment to ban all advertising simply because some of it might be misleading. Hiett v. United States, 415 F. 2d 664, 671 (5th Cir. 1969), cert. denied, 397 U.S. 936 (1970). The narrower alternative of prohibiting advertising that is false or misleading is available. Virginia State Board of Pharmacy, 96 S. Ct. at 1830, n. 24; 96 S. Ct. at 1833-35 (Stewart, J., concurring). Indeed, that alternative has been exercised. Disciplinary Rule 1-102(A)(4) prohibits a lawyer from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." False or deceptive advertising is forbidden by state and federal statutes. E.g. Ariz. Rev. Stat. §§ 44-1481, 44-1522; 15 U.S.C. 45. A total ban is accordingly unjustified.

Appellants' advertising itself is not deceptive or misleading. There is nothing in the record to suggest that appellants deviate from the advertised fees, or that they do not render the advertised services competently. The advertisement did ask the reader whether

he needed a lawyer. Bar Counsel argued below that this is misleading because one can obtain a name change without a lawyer, even though the proceeding is a judicial one governed by statutory standards.<sup>8</sup> Ariz. Rev. Stat. §§ 12-601, 12-602. This hardly constitutes deception. A litigant is virtually always entitled to conduct his own case, but it is wholly unreasonable to conclude from that fact that he does not "need" a lawyer. The only meaning that can sensibly be ascribed to the term "need" in the context of the advertisement is that a person needs a lawyer when he feels the need of a lawyer's assistance in doing that which lawyers usually do.<sup>9</sup> In any

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<sup>8</sup>When a name change problem can be settled by administrative action, appellants send the client on his way with instructions how to effectuate the change himself. When the client seeks appellants' services for a name change which requires a judicial proceeding, however, appellants do not feel under a duty to raise the suggestion that the client do it himself. (A. 111-113)

<sup>9</sup>The Maricopa County Bar Association apparently places this sensible construction on the term. One of its brochures



event, appellants were not charged with deceptive advertising, merely with advertising, and the Court below made no determination that appellants' advertisement was deceptive in any particular.<sup>10</sup>

All of the justifications discussed above suffer from the fatal defect highlighted in Virginia State Board of Pharmacy, 96 S. Ct. at 1829: they rest on the notion of protecting the public by keeping it in ignorance. Thus barratry is to be avoided by suppressing information aimed at those who do not know of their rights or legal needs. Quality is to be upheld by keeping the public from learning in advance the fees lawyers charge. Deception by some attorneys

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for public distribution contains on its front page in large letters in English and Spanish: "Do You Need A Lawyer?", along with the name and telephone number of the Lawyer Referral Service.

<sup>10</sup> Justice Gordon in his concurring opinion below suggested that it might be deceptive to advertise legal services in connection with an uncontested adoption when a statute requires the county attorney to perform similar services upon

is to be avoided by prohibiting them all from public advertising. This is not the way of the First Amendment.

The remaining justifications offered or implied to support the ban upon advertising are even less substantial. A desire to uphold the dignity of the profession (Exh. 3, A. 22, 287-88) is not primarily a public concern. There has been no demonstration that the dignity of lawyers is inextricably tied to the public's respect for the law. Nor is there any factual support for the conjecture that advertising inevitably leads to loss of dignity;

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application. This statement embodies a serious misunderstanding which must be corrected.

The services which the county attorney performs under Ariz. Rev. Stat. § 8-127 are to obtain a consented adoption. Consent is required from both natural parents with certain exceptions, one of which is that consent is not necessary from a parent whose parental rights have been terminated. Ariz. Rev. Stat. § 8-106. That termination, commonly called a "severance" proceeding, conducted under Ariz. Rev. Stat. §§ 8-531 through 8-544, is the service advertised by appellants. It is not performed free upon application by the county attorney.

it is questionable that stockbrokers or bankers are considered undignified because they or their institutions advertise. Limited exceptions to the ban on advertising suggest that the Bar does not consider advertising invariably undignified. See Disciplinary Rule 2-101.

A final, possible reason for the prohibition of advertising is to prevent competition, unseemly or otherwise. There is a suggestion in the record, for example, that if advertising were permitted large firms would employ their greater resources in advertising to the detriment of smaller, less established firms. (Exh. 3, A. 22, 293-94). This argument overlooks the substantial advantage now enjoyed by established firms under an enforced absence of advertising. D. Rosenthal, *Lawyer and Client: Who's in Charge?* 138 (1974). More important, the argument is impermissible in terms of freedom of commercial expression.

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the

relative voice of others is wholly foreign to the First Amendment....

Buckley v. Valeo, 96 S. Ct. 612, 649 (1976).

There are several indications in the record from State Bar witnesses that aspiring members of the professions are able to succeed economically without advertising (Exh. 3, A. 22, 294-95; Exh. 4, A. 23, 318-19). Indeed, increased economic success is to be expected among suppliers of services when price competition is restricted by prohibiting advertising or by other means. That does not infuse the prohibition with a public interest. There is consequently no important state interest supporting the ban of Disciplinary Rule 2-101(B), and the Court below erred in failing to strike it down.

C. Disciplinary Rule 2-101(B) is fatally overbroad in its ban upon public advertising by individual attorneys.

A regulation directed toward speech or press which prohibits expression protected by the First Amendment is void,

and cannot be applied even to a person whose activity is not constitutionally privileged. Coates v. Cincinnati, 402 U.S. 611 (1972). The ban of Disciplinary Rule 2-101(B) prohibits much expression protected by the First Amendment; its overbreadth is substantial. See Broadrick v. Oklahoma, 413 U.S. 601, 615-16 (1973). First, it prohibits all individual lawyers' advertising of fees and services, no matter how accurate and useful. In addition, it endangers attorneys who wish to place advertisements discussing such issues as the merits of legal clinics or the desirability of lawyer advertising, if those attorneys identify themselves as such in the publication. Yet the fact that they are practicing attorneys is of importance to the public in evaluating the significance of the message.

It is recognized that this type of wholesale overbreadth was sanctioned in Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935), relied upon by appellee and the Court below. But the prohibition against professional advertising in Semler was

attacked on substantive due process and equal protection grounds; no First Amendment claim was involved. When a First Amendment challenge is made, it is clear that an overbreadth attack is proper against a regulation of commercial speech. Bigelow v. Virginia, 421 U.S. 809 (1975).

Appellants do not contend, nor could they, that attorney advertisements are entitled to the same breadth of protection given political speech. This Court has indicated that problems of confusion and deception might arise if the professions undertook "certain kinds" of advertising. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S. Ct. at 1831, n. 25. Certainly false and misleading advertising may be prohibited for attorneys as for others. In some cases time, place and manner restrictions may be imposed to prevent handbilling to persons under unusual physical or mental stress, as at the scene of accidents or in hospital emergency rooms. But the important goal is that the presumption be placed where the First Amendment



places it -- in favor of speech. Misleading advertising, for instance, is often best handled by a requirement of additional disclosure, so that more information is furnished to the public for purposes of individual and societal choice. See Virginia State Board of Pharmacy, 96 S. Ct. at 1829. Disciplinary Rule 2-101(B) and the decision below follow the contrary path of shutting off the flow of information, and for that reason they cannot stand consistently with the First Amendment.

## II. ENFORCEMENT OF DISCIPLINARY RULE 2-101(B) AGAINST APPELLANTS VIOLATES THE SHERMAN ACT

### A. The Sherman Act is applicable to the State Bar and to a restraint upon the advertisement of fees.

In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), this Court held that minimum fee schedules established and enforced by bar associations violated the Sherman Act. In rejecting the traditional claim of the learned professions

to an exemption from the antitrust laws, this Court noted that "Congress intended to strike as broadly as it could in § 1 of the Sherman Act...." Id. at 787. That expansive intent and the terms of the statute itself support the application of the Sherman Act to the ban upon lawyers' advertising in this case.

Section 1 of the Sherman Act prohibits contracts or conspiracies in restraint of trade, and Section 2 prohibits monopolizing or attempting to monopolize. 15 U.S.C. §§ 1, 2. It is clear in the present case that members and officials of the State Bar of Arizona, taking their lead from the American Bar Association (Exh. 5, A. 23, 351-53), have cooperated in restricting advertising, including the advertisement of fees, and that this restriction is enforced as part of the system of regulation attending the Bar's monopoly over the practice of law in the state.

A combination or agreement which has as one of its goals the suppression of direct advertising of prices is per se violative of the Sherman Act. United States v. Gasoline Retailers Ass'n,

Inc., 285 F.2d 688 (7th Cir. 1961). See Louisiana Petroleum Retail Dealers v. Texas Co., 148 F.Supp. 334 (W. D. La. 1956). Status as a profession does not authorize substitution of a "rule of reason" for a per se rule. United States v. National Society of Professional Engineers, 404 F. Supp. 457 (D. D.C. 1975); Cf. American Medical Ass'n v. United States, 130 F.2d 233 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943). In any event, the severe anticompetitive effect of a prohibition of price advertising is established in the record. (A. 173-188; Exhs. 13, 14). To the extent, then, that the decision below may purport to rest upon a qualitative distinction in competitive effect between minimum fees and a restraint upon fee advertising, it is erroneous.<sup>11</sup>

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<sup>11</sup>The Federal Trade Commission has proposed regulations which would prohibit any state restrictions on the disclosure of accurate price information in the funeral industry, 40 Fed. Reg. 39901 (1975) and which would permit advertising of the price and availability of prescription eyeglasses, 41 Fed. Reg. 2399 (1976). See also California Citizens Action Group v. Dept. of Consumer Affairs, 407 F. Supp. 1075 (C.D. Cal.

The restraint upon advertising substantially affects interstate commerce, both in the practice of members of the State Bar who benefit competitively from the restriction (Exh. 5, pp. 10-11), and in appellants' own practice (Tr. 154-158; Exh. 16). Appellant's advertisement itself was distributed in interstate commerce. (A. 587). These effects upon commerce meet the standards set by Goldfarb v. Virginia State Bar, supra, for application of the Sherman Act.

As the Court below recognized, it is a valid defense in a non-antitrust proceeding that the order sought would enforce a violation of the antitrust laws, Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227, 261 (1909); Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942),

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1976), vacated and remanded for further consideration in light of Virginia State Board of Pharmacy, supra, 96 S. Ct. 2619 (1976).

The FTC has also commenced action against the American Medical Association for its restrictions upon advertising, 3 CCH Trade Reg. Rep. 21,068 (1975), as has the Justice Department against the American Bar Association, (Civ. No. 76-1182, D.D.C. 1976).

and that defense is available in state court, General Aniline & Film Corp. v. Bayer Co., 305 N.Y. 479, 484-84, 113 N.E. 2d 844, 847 (1953). The Court below refused, however to uphold the antitrust defense, and its primary reason was that the Sherman Act was inapplicable under the state action exemption doctrine of Parker v. Brown, 317 U.S. 341 (1943). It is accordingly upon that point that the application of the antitrust laws in the present case turns.

B. The ban upon fee advertising is not exempt from the Sherman Act by reason of the "state action" doctrine of Parker v. Brown, as elaborated in Cantor v. Detroit Edison Co., 96 S. Ct. 3110 (1976).

Parker v. Brown held that an anti-competitive raisin marketing program operated by the "legislative command of the state" was not within the scope of the Sherman Act. 317 U.S. 341, 150 (1943). This Court was careful to note, however:

True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, Northern Securities Co. v. United States, 193 U.S. 197; and we have no questions of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade....

Id. at 351-52. See also, George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), cert. denied, 400 U.S. 850 (1970); Woods Exploration & Prod. Co. v. Aluminum Corp. of America, 438 F.2d 1286 (5th Cir. 1971).

Last term, this Court defined the Parker "exemption" in Cantor v. Detroit Edison Co., 96 S. Ct. 3110 (1976). There it was held that a regulated power company's practice of supplying free light bulbs violated the Sherman Act even though the policy had been approved by the state utility commission and the utility was not free under state law to deviate from it. In rejecting the utility's Parker defense, this Court ruled: (1) that a privately initiated



restraint is not withdrawn from the Sherman Act by its embodiment in a state command; and (2) that pervasive state regulation of an industry did not give rise to a Parker v. Brown exemption where the exemption in question was not necessary to make the regulatory scheme work. It further stated (3) that even in cases of direct conflict, it is not necessarily true that the federal interest must inevitably be subordinated to that of the state. All of these elements of the Cantor decision are repeated in the present case, and require reversal of the decision below.

1. Disciplinary Rule 2-101(B) is the result of private initiative and is subject to the federal antitrust laws.

The ban upon advertising by attorneys originated with the private American Bar Association in 1908 as Canon 27 of the ABA Canons of Professional Ethics.<sup>12</sup>

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<sup>12</sup>The first code of ethics in the United States, that of the Alabama State

H. Drinker, Legal Ethics 23-25, 215 (1953). The Arizona Supreme Court adopted that Canon, along with the other ABA canons, into its rules in 1954.<sup>13</sup>

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Bar Association in 1887, provided that "Newspaper advertisements, circulars and business cards, tending professional services to the general public, are proper...." H. Drinker, Legal Ethics 356 (1953).

<sup>13</sup>The ABA Canons of Ethics were also incorporated by reference into Arizona statutes in 1919. Ariz. Sess. Laws 1919, c. 158. A vestige of this adoption remains today as Ariz. Rev. Stat. § 32-267(8), which authorizes the Supreme Court of Arizona to suspend or disbar attorneys "[f]or any other unprofessional or unethical conduct violative of the canons and ethics of an attorney at law as adopted by the American bar association." That statute was not relied upon by the Court below, nor was it referred to in the charge against appellants. (A. 6). The Supreme Court of Arizona has strongly stated that it has inherent power to impose restrictions on the practice of law or to define unauthorized practice of law. In re Greer, 52 Ariz. 385, 389-90, 81 P.2d 96, 98 (1938); State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 95, 366 P.2d 1, 14 (1961). In its opinion below, the Court stated that the legislative branch may not interfere with the Court in its constitutional regulation of the practice of law. (Juris. St. App. p.

Ariz. Code, 1939 (1954 Supp. p. 211; Rule 1(B)). The American Bar Association subsequently revised its Canons into the Code of Professional Responsibility to be effective in 1970. The State Bar of Arizona participated in this process. The prohibition of advertising appears as Disciplinary Rule 2-101(B) of that Code. It was adopted, along with nearly all of the rest of the ABA Code, by the Supreme Court of Arizona in 1970. Ariz. Sup. Ct. Rule 29(a). A 1974 amendment of DR 2-101(B) by the American Bar Association to accommodate institutional advertising by legal assistance organizations was adopted by the Supreme Court of Arizona in 1975 with minor modifications in language.<sup>14</sup>

The structure of the integrated State Bar of Arizona is established

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5a). The jurisdictional power of the Court below in applying its rule to appellants consequently does not depend on the state statute, and would be unaffected by its repeal. It is accordingly the Court's rule, and not the statute, which is at issue in this case.

<sup>14</sup>See note 2, supra p. 13.

by statute, Ariz. Rev. Stat. §§ 32-201-242, but it is autonomous and self-governing in operation. It is represented in the American Bar Association. (Exh. 5, A. 23, 353-54). Its role in enforcing the Code of Professional Responsibility is illustrated by this case, in which it prepared the charge, maintained the prosecution of it, and conducted hearings resulting in recommendations to the Arizona Supreme Court. In addition, its Committee on Rules of Professional Conduct issues ethics opinions which aid in the administration of the Code of Professional Responsibility. In short, the activities of the State Bar of Arizona virtually parallel those of the Virginia State Bar, of which this Court said:

The fact that the State Bar is a state agency for some purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members."

Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975).

Since a private agreement by the American Bar Association and the State Bar of Arizona to prohibit price advertising is subject to the federal antitrust laws, no immunity is gained by their success in having the prohibition written into the command of the Arizona Supreme Court. Cf. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962). Antitrust immunity is not even conferred when the state command is essential to the functioning of the restraint. Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 389 (1951); Cantor v. Detroit Edison Co., 96 S. Ct. at 3118 and n. 30.

As indicated in Cantor, it is not unfair to hold private parties responsible under the antitrust laws when, as here, they have exercised a considerable degree of freedom of choice in initiating the restraint. 96 S. Ct. at 3118-19. There is clearly no unfairness in the present case, where appellants are simply seeking to invalidate the restraint, not to impose treble-damage liability upon the State Bar or the

American Bar Association.<sup>15</sup> See Cantor, 96 S. Ct. at 3128, n. 6 (Blackmun, J., concurring).

Since the Bar's prohibition of advertising is invalid under Cantor even though it has been embodied in an Arizona Supreme Court rule, it is obviously appropriate to permit a Sherman Act defense to enforcement of that rule. For example, it is clear after the decision in Cantor that the Michigan Public Service Commission is precluded from enforcement of the tariff provisions regarding the distribution of free light bulbs by Detroit Edison Co. Viewed from another perspective, the appellants in

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<sup>15</sup> The State Bar is not aided by Eastern Ry. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 217 (1961). There plaintiffs sought to impose Sherman Act liability for the actions of railroads in conducting a publicity campaign to defeat legislative action. The case is inapplicable where private parties act in violation of the Sherman Act, as the State Bar and American Bar Association do in agreeing not to advertise or permit advertisement, even though that action may have been approved by the state. Cantor, 96 S. Ct. at 3122.



the present case simply seek to be excused from forced participation in concerted action of the bar associations which violates the Sherman Act. The decision in Cantor entitles them to that relief.

2. The federal antitrust laws prevail over the state rule suppressing advertising because that rule is not necessary to the state's regulation of the practice of law.

Cantor applied the Sherman Act to a public utility, a segment of industry that is probably more pervasively regulated by the states than any other. In rejecting a Parker v. Brown exemption, this Court held that a regulation which conflicts with the federal antitrust laws is invalid unless it is necessary to make the state regulatory scheme work. 96 S. Ct. at 3120. The ruling parallels the approach that has prevailed in determining whether federal regulatory statutes have constituted an implied repeal of the antitrust laws. For example, in Silver v.

New York Stock Exchange, 373 U.S. 341 (1963), this Court held that the authority of self-regulation granted the stock exchange in the Securities Exchange Act of 1934 did not exempt the exchange and its members from liability for a group boycott under the Sherman Act. The Court stated:

...[T]he proper approach to this case, in our view, is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted.

373 U.S. at 357. Any repeal of the antitrust laws was to be implied "only to the minimum extent necessary" to make the regulatory program work. Id. See also Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). There is nothing in the record to support a contention that the ban upon general advertising by attorneys is essential to Arizona's overall regulation of the practice of law. In this area perhaps more than in others, it is essential "not to confuse the familiar with the necessary". See Griffin v. Illinois, 351 U.S.

12, 20 (1956) (Frankfurter, J. concurring). Advertising will not affect the state's control over the admission of attorneys to practice, their conduct in practice under the great majority of disciplinary rules, and the imposition of sanctions against them for violation of those rules. A total ban upon advertising is not necessary to protect the public from deception or incompetence. See pp. 43-46, supra. The fact that regulation of the practice of law is consistent with advertising is indicated by the institutional advertising now permitted, DR 2-101(B), by law list advertising, DR 2-102(A)(6), and by initiatives under way in some states to permit certain types of individual advertising. E.g., N.Y. State Bar Ethics Op. 441, Aug. 11, 1976; State Bar of Calif. Program in Lawyer Advertising, Bd. of Governors Recommendation, Aug. 26, 1976. The prohibition of appellants' fee advertising is consequently not necessary to make the state regulatory scheme work, and for that reason it is not exempt from the federal antitrust laws.

3. The federal interest in enforcing the Sherman Act outweighs the state's interest in its rule suppressing advertising.

Even if the ban upon advertising were central to the state's regulation of the practice of law, which appellants do not concede, it does not inevitably follow that it is immune from the Sherman Act. Cantor, 96 S. Ct. at 3119. In determining whether the federal antitrust laws prohibit conduct commanded by a state regulatory authority, some comparative weighing of the conflicting interests seems inevitable. As this Court has said:

The Sherman Act was designed to be a charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the

same time providing an environment conducive to the preservation of our democratic political and social institutions.

Northern Pacific R. Co. v. United States, 356 U.S. 1, 4 (1958). That strong national policy ought not to be automatically frustrated by the simple election of a state to dictate the operation of an industry along noncompetitive lines contrary to the free enterprise model protected by the federal statute. See Posner, The Proper Relationship Between State Regulation and the Federal Antitrust Laws, 49 N.Y.U.L. Rev. 693 (1974). Even when the state regulation in issue is necessary to the operation of the regulatory scheme, Parker v. Brown does not compel an exemption. In Parker the state noncompetitive marketing system paralleled a federal system of noncompetitive marketing established by a statute which recognized the possibility of concurrent and complementary state schemes. See H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 537 (1949). There is no comparable federal exception

to the Sherman Act for the delivery of legal services. On the contrary, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) testifies to a national policy of price competition in that sector.

When Congress establishes a regulatory system containing essential noncompetitive elements, an exception to the antitrust laws is implied. Gordon v. New York Stock Exchange, 422 U.S. 659 (1975). It does not follow from that fact, however, that a comparable establishment of a regulatory system by a state inevitably confers the same immunity. Congress, after all, is entitled to repeal the Sherman Act and the states are not. As the Court of Appeals stated in Hecht v. Pro-Football, Inc., 444 F.2d 931, 935 (D.C. Cir. 1971), cert. denied, 404 U.S. 1047 (1972):

...[W]e suggest that it may be inaccurate and confusing to speak of "valid governmental action which is immune from application of the antitrust laws." Rather, the proper inquiry would seem to be to what extent Congress



has knowingly adopted a policy contrary to or inconsistent with the previously established antitrust laws, or, where state action is concerned (since states are not named in the Sherman Act and antitrust laws are directed at suppression of anticompetitive business action), the inquiry should be to what extent is the state action permissible as not contravening the federal antitrust laws, which in our federal system constitute overriding legislation under the federal commerce power.

In determining what state action is "permissible" within the intended scope of the antitrust laws, it is appropriate to assess the relative importance of the state interest being asserted. Cantor, 96 S. Ct. at 3126 (Blackmun, J., concurring). But the state must be subject to the Sherman Act unless it can show that its interest in the regulation in question outweighs the national interest in competition. No such showing has been made here.

The primacy of the public interest in advertisement of the cost and availability of legal services, and the absence

of state interest in the suppression of it, have been fully set forth in Part I of this argument, pp. 30-51, supra, and will not be restated here. Viewing the conflicting interests from an antitrust standpoint only buttresses the conclusion that an efficient allocation of resources, the provision of services of good quality at the lowest cost, and the stimulation of innovation are all best served by permitting competitive advertising. See Rept., Supply of Services of Solicitors in England and Wales in Relation to Restrictions on Advertising, Monopolies and Mergers Commission (1976) (App. 6a-9a, infra).

A state action exemption is particularly unjustified where, as here, the state scheme of regulation has anticompetitive effects without substituting any compensating state regulation. For example, in regulating public utilities the state may justifiably confer a monopoly when it regulates rates to prevent the excesses which might otherwise attend monopoly power. But in its suppression of price advertising, Disciplinary Rule 2-101(B) is anti-competitive and tends to increase fees

(A. 187-88; 193) in a way which is not corrected by any state system of fee regulation. It is true that Disciplinary Rule 2-106(A) prohibits the charging of a "clearly excessive fee", but the ethics committees of the American Bar Association and the State Bar of Arizona have stated that the amount of a fee presents no ethical question unless it is so excessive as to amount to a misappropriation of the client's funds. ABA Comm. on Prof. Ethics Op. 27 (1930), Op. 320 (1968); State Bar of Ariz. Comm. on Rules of Prof. Conduct Op. No. 179 (1965). The state regulatory scheme consequently leaves the setting of fees entirely to the private initiative of those who benefit from the prevention of competition inherent in the prohibition of fee advertising. Under these circumstances, there is no reason for shielding the prohibition from the reach of the Sherman Act. Cf. Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011 (3d Cir. 1971).

C. The state court's regulation of the practice of law is not immune from the federal antitrust laws under the doctrine of separation of powers.

The principal opinion in the Court below suggested that neither the federal nor the state legislature could interfere with the Court's regulation of the practice of law. (Juris. St. App. 5a). This contention appears to be based upon the doctrine of separation of powers, but that concept is not generally applicable between the state and federal levels of government. Cf. Baker v. Carr, 369 U.S. 186 (1962). Nor is the practice of law inherently free from legislative regulation; state legislatures may regulate wherever the state constitution permits it. In re Cooper, 22 N.Y. 67, 90-91 (1860); J. Fisher and D. Lackman, Unauthorized Practice Handbook (Am. Bar. Found. 1972). State courts are entitled to no greater freedom from the federal legislature than from state legislatures. The supremacy clause itself refutes the proposition. U.S. Const., Art. VI, § 2. Cf. Testa v. Katt, 330 U.S. 386 (1947).

Nor does any principle of federalism decree that state court regulation of attorneys withdraws them from the otherwise proper reach of the federal commerce power. Attorneys may be "officers of the courts", but they are not employees of the courts.

...[A] lawyer is engaged in a private profession, important though it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The word "officer" as it has always been applied to lawyers conveys quite a different meaning from the word "officer" as applied to people serving as officers within the conventional meaning of that term.

Cammer v. United States, 350 U.S. 399, 405 (1956). An application of the antitrust laws to the independent practices of lawyers does not, therefore, constitute an attempt at federal regulation of the state court as such. It merely applies a federal law to a form of interstate commerce in a manner which preempts a conflicting state command.

Cantor v. Detroit Edison Co., 96 S. Ct. 3110 (1976).

#### CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Arizona should be reversed.

Respectfully submitted,

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November 1976



# APPENDIX

## APPENDIX

### U.S. Const., Amendment 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### Sherman Act, 15 U.S.C. §§ 1 and 2:

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied in intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under

section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Ariz. Rev. Stat. § 32-267. Grounds for disbarment.

An attorney licensed to practice law in this state may have his license revoked or suspended by the supreme court for any of the following reasons:

\* \* \* \*

8. For any other unprofessional or unethical conduct violative of the canons and ethics of the profession of an attorney at law as adopted by the American Bar Association.

Ariz. Rev. Stat. § 44-1481. Fraudulent advertising practices defined; violation; penalty.

A. A person is guilty of a misdemeanor who:

1. Knowingly and with the intent to sell to the public real or personal property or services, or to induce the public to acquire an interest therein, makes and publishes an advertisement, either printed or by public outcry or proclamation, or otherwise, containing any false, fraudulent, deceptive or misleading representations in respect to such property or services, or the manner of its sale or distribution.

2. Publishes circulates or disseminates any statement or assertion of fact concerning real estate which is known by him to be untrue, and which is made or disseminated with the intention of misleading.

B. A merchant is guilty of a misdemeanor who advertises or displays any brand of goods known to the general public and quotes prices in connection therewith as an inducement to attract purchasers to the place of business so advertised, and makes false statements regarding the quality or merits of the goods advertised.

C. A person or merchant who violates the provisions of this section shall be punished as follows:

1. For the first offense, by a fine of



not less than twenty-five nor more than two hundred dollars, or by imprisonment in the county jail for not less than thirty nor more than ninety days.

2. For the second offense, by a fine of not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail for not less than sixty days nor more than six months.

3. For the third offense, by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment in the county jail for not less than ninety days nor more than one year.

Ariz. Rev. Stat. § 44-1522. Unlawful practices; intended interpretation of provisions.

A. The act, use, or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived, or damaged thereby, is declared to be an unlawful practice.

B. It is the intent of the legislature that, in construing the provisions of subsection A of this section, that the courts may use as a guide interpretations given by the federal trade commission and the federal courts to §§ 45, 52 and 55(a) (1) Title 15, U.S.C.A. of the federal trade commission act. Added Laws 1967, Ch. 43, § 1.

Ariz. Supreme Court Rule 29(a), 17 Ariz. Rev. Stat. (Supp. 1976):

DR 1-102. Misconduct

(A) A lawyer shall not:

\* \* \* \*

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

DR 2-102. Professional Notices, Letterheads, Offices, and Law Lists

(A) A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:

\* \* \* \*

(6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that

the lawyer or law firm specializes in a particular field or law or law practice but only if authorized under DR 2-105(A) (4); date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional associations and societies, foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented.

\* \* \* \*

DR 6-101. Failing to Act Competently

(A) A lawyer shall not:

- (1) (DR 6-101(A)(1) was omitted by the Arizona Supreme Court in its Order adopting the Code of Professional Responsibility.)
- (2) Handle a legal matter without preparation adequate in the circumstances.
- (3) Neglect a legal matter entrusted to him.

---

Monopolies and Mergers Commission,  
SERVICES OF SOLICITORS IN ENGLAND AND  
WALES, A Report on the Supply of Services  
of Solicitors in England and Wales in  
Relation to Restrictions on Advertising  
(Her Majesty's Stationery Office, 1976):

\* \* \* \*

## Chapter 5. Conclusions.

\* \* \* \*

Efficiency and the competitive situation.

\* \* \* \*

121. We know of no method of making a quantitative comparison between the present state of efficiency of solicitors' practices and their hypothetical state of efficiency if advertising were permitted. There is at least no obvious reason for supposing the freedom to advertise would lead, on average, to a lower degree of efficiency than exists at present. The Council argued that freedom to advertise would simply lead to increase in overhead costs, and that even if advertising led to increased business there would be little or no corresponding economies of scale. We do not dispute that some advertising cost might be incurred simply to neutralise the advertising initiated by other solicitors, thereby raising total costs without causing any reallocation of business. But not all advertising would be of this kind. Moreover, we think it likely that some practices are more efficient than others (either generally or in some branches of activity), so that reallocation of some work could improve the efficiency with which the work as a whole was carried out. Finally, it seems to us likely that solicitors in general would see no advantage in advertising on a lavish scale, though on occasions some firms might wish to spend relatively heavily in an attempt to expand their business (for example in order to secure such economies of larger scale as might be available to them in the employment of more specialised staff).



122. As regards innovation, we accept that the profession has not stood still and that new methods and modern office techniques have been adopted. But the decision whether or not to introduce innovatory methods or services into an individual practice, particularly if the introduction would involve capital expenditure or expansion of staff, can depend upon the amount of additional business that could be handled as a result of new methods and that could be expected as the result of new services. Not all practitioners will wish to take the risk; and at present some of the more enterprising who might wish to do so might be deterred by the consideration that they would be unable to make proper use of these methods or services through their inability to increase their business by advertising.

123. As to the establishment of new practices (whether partnerships or individual practitioners), we think that the restrictions on advertising must indeed impede new practices in their efforts to establish themselves. This we regard as undesirable since to the extent that they discourage the setting up of new practices potential competition is reduced, and the incentive to efficiency and a high standard of service to the public is diminished.

124. It is our view that it is a significant disadvantage of the existing restrictions on advertising of solicitors' services that they have an adverse effect on the competitiveness and efficiency of the profession, on the introduction of innovatory methods and services and on the setting up of new practices.

125. There is another aspect of the matter related both to the supply of

information and to competition. Solicitors do not compete only with other solicitors. For certain types of business, for example advice on taxation matters, they compete with others including firms of accountants and banks. There are no restrictions on advertising by banks comparable to those on advertising by solicitors, and we have recommended in an earlier report that the restrictions on advertising by accountants should be relaxed. Similar relaxation in the case of solicitors should thus both provide the public with more information on how best to obtain help in such matters and also increase competition. These results we would regard as in the public interest.

\* \* \* \*

136. We consider that Rule 1 of the Solicitors' Practice Rules, which places a general prohibition on advertising and soliciting business, should be terminated and replaced by a rule which would permit any solicitor in England and Wales to use, whenever he thinks fit, such methods of publicity as he thinks fit, provide that:

- (1) No advertisement, circular or other form of publicity used by a solicitor should claim for his practice superiority in any respect over any or all other solicitors' practices.
- (2) Such publicity should not contain any inaccuracies or misleading statements.
- (3) While advertisements, circulars and other publicity or methods of soliciting may make clear the intention of the solicitor to seek custom, they should



10a

not be of a character that  
could reasonably be regarded as  
likely to bring the profession  
into disrepute.

★ ★ ★ ★

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FOR ARGUMENT

Supreme Court, U. S.

FILED

DEC 14 1976

MICHAEL RODAK, JR., CLERK

IN THE

**Supreme Court of the United States**

October Term, 1976

No. 76-316

JOHN R. BATES and VAN O'STEEN  
Appellants,

v.

THE STATE BAR OF ARIZONA,  
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF OF APPELLEE

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BRIEF OF APPELLEE



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IN THE  
**Supreme Court of the United States**

October Term, 1976

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No. 76-316

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JOHN R. BATES and VAN O'STEEN  
Appellants,

v.

THE STATE BAR OF ARIZONA,  
Appellee.

---

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

---

BRIEF OF APPELLEE

JURISDICTION

This is a State Bar disciplinary proceeding. The final order of the Arizona Supreme Court imposing discipline was entered on July 26, 1976. The defenses were constitutional and antitrust challenges to an Arizona Supreme Court disciplinary rule concerning lawyer ethics. The opinion, as yet unpublished, is attached to the Jurisdictional Statement. The Notice of Appeal to this Court was filed on July 28, 1976. Probable jurisdiction was noted here on October 4, 1976. This Court has jurisdiction under 28 U.S.C. § 1257(2).

QUESTIONS PRESENTED

1. Does Disciplinary Rule 2-101(B) of the Code of Professional Responsibility as adopted by the Arizona Supreme Court violate appellants' rights to freedom of speech and

press under the First Amendment as incorporated in the Fourteenth?

2. Does a ban upon lawyer advertising originated by the American Bar Association and incorporated into a rule of the Arizona Supreme Court violate the Sherman Act notwithstanding the state-action exemption doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)?

#### CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

1. The core of Disciplinary Rule 2-101(B), as embodied in Rule 29(A) of the Supreme Court of Arizona, 17A Ariz. Rev. Stat. (1976 Supp.) is as follows:

"DR 2-101

....

"(B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf. ...."

(Seven exceptions follow, including those for legal assistance organizations, which appellants' "clinic" does not purport to be.)

2. The applicable provisions of the First and Fourteenth Amendments are as follows:

(a) First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press.

(b) Fourteenth Amendment: "No state shall . . . abridge the privileges or immunities of citizens of the United States; nor . . . deprive any person of life, liberty, or property, without due process of law. . . ."

3. The portion of the Sherman Act, 15 U.S.C. § 1,

relied upon by the appellants is as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ."

#### STATEMENT OF FACTS

Appellants, two members of the Arizona Bar, operating what they have styled a "legal clinic," placed an advertisement in a Phoenix newspaper offering their services and stating their prices. The advertisement is reproduced in Appendix A hereto. This was a flat violation of the Arizona Supreme Court's Disciplinary Rule 2-101(B) which prohibits lawyer advertising; the precise relevant language is: "A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer, through newspaper or magazine advertisements . . . ."

The rule is one adopted by the Arizona Supreme Court under the express statutory authority of A.R.S. §§ 32-237, 264. It is essentially the same as the disciplinary rule of the American Bar Association, without certain variations recently recommended by the House of Delegates. The violation was uncontested (App. 70, 127). After proceedings before a Special Local Administrative Committee, an appeal to the Board of Governors of The State Bar, and a further appeal to the Arizona Supreme Court, the violation was confirmed and the rule upheld in an opinion by Chief Justice Cameron against the various attacks made upon it. Since, while the dispute is earnest, the violation was a good faith challenge to the validity of the rule, the Arizona Supreme Court contented itself with the imposition of censure. This has been stayed by order of Justice Rehnquist pending final disposition of the matter here.

There are two questions presented: first, whether the Disciplinary Rule denies free speech, and second, whether

it violates the antitrust laws. From these three factual areas emerge for discussion: first, the identification of the appellants, their activities, and their advertisement; second, the professional tradition and practice in respect to advertising; and third, the competitive consequences of the advertising restriction. To avoid duplication, we reserve the latter two for the Argument portion of this brief.

The appellants purport to operate what they denominate a "legal clinic" (App. 69). Since an important portion of their position is that a legal clinic is somehow materially different from a conventional law firm, and is somehow better, more wholesome, more socially serviceable and therefore subject to some special consideration under the laws, we turn to the precise nature of their professional operation.

Putting the matter most favorably to the appellants, we set forth their description of what they are doing. They seek:

"... to extend legal services, quality legal services at the most reasonable fees possible to persons of moderate and low income; people who were not capable of qualifying under the financial guidelines of the Legal Aid Society, and therefore had traditionally had difficulty finding lawyers." (App. 75).

This, according to appellants, is achieved by cost-saving features, by specialization, and by the extensive use of paralegal or legal assistant personnel (App. 75-76). Illustrations of their economies are the use of printed forms and automatic typewriter equipment along with the maintenance of a very small library (App. 79).

Chief Justice Burger in his concurring opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 96 S. Ct. 1817, 1832 (May 24, 1976) (hereafter the *Prescription Drugs* case) observed: "Nor am I sure that even advertising the price of certain professional services is not inherently misleading, since what the professional must do will vary greatly in individual cases." The

good faith of the appellants in this case is apparent from the record, and very obviously the simple advertisement published represents a meticulous effort to avoid error. It thus puts to the test the question of the Chief Justice as to whether legal service advertising is highly likely to be "inherently misleading," for even this carefully prepared blurb is probably deceptive.

The ad describes the office as a "legal clinic." Appellants acknowledge that the term cannot be defined in any regularly established definition of which they are aware (App. 84-85). So nearly as appellants can describe it, a legal clinic is a body which attempts to supply low and middle income persons with standardized legal services, through automatic equipment and liberal use of paralegals, at low prices. Appellants recognize that law offices in the State of Arizona commonly have many of these identical features, *i.e.*, they use paralegals, they use automatic equipment, they have so-called systems operations (App. 79-80). Moreover, the appellants' "clinic" is not restricted at all, except by the happenstance of who comes to them, to persons of any particular income level. The clients of the office range from the welfare level to persons with a family income of \$25,000 a year, and a few with even more than that (App. 81-82); they would take a client with a \$50,000 income (T. 51). The fact is that the appellants are willing to serve anyone in the community, regardless of income (App. 82).

The appellants' clientele is a mixture. Some persons are sufficiently poor so that they might be able to apply to Legal Aid for assistance (App. 86). Others could perfectly well take their work to any law office, and the appellants are "undoubtedly competing for that work" (App. 88). In part the appellants believe that they are performing legal services for persons who would otherwise not get such services—in other words, expressly, they handle divorces, bankruptcy matters, and personal injury matters which would not otherwise be in court (App. 89-90).



Appellants take personal injury work. They wish to advertise for that work by newspaper advertisements but do not care to walk through hospitals or knock on doors or press cards into the hands of the injured after the accident (App. 90-91). However, they believe that the same First Amendment rights they assert for newspaper advertisements would probably give them an equal right to solicit the injured or the hospital patient if they were of a mind to do so (App. 91-92). On the other hand, the appellants are not of clear opinion at the moment as to whether they have the right to circulate handbills throughout the community looking for law business (App. 92-94).

Appellants make no pretense of offering a complete service, even in the divorces they commonly handle. They accept no contested divorces (App. 96-97). If, after the clients have come to the office, any difficulty crops up, no matter how small, the clients are turned away (App. 100).

The services purport to be offered "at very reasonable fees." The price for an uncontested divorce is \$175. The time required on these divorces ranges from a minimum of an hour and a half to three hours, but the same fee applies (App. 105). Yet the hourly rate of the office is \$40 for lawyers and \$20 for assistants (App. 131-32). This led Justice Gordon of the Arizona Supreme Court, concurring, to observe that there are "instances in which \$175 fee quoted for this service would be unreasonably high."

The price for a name change is \$95. A person can, through the Clerk of the Court, perform this service for himself without charge, but the clinic does not regard itself as obligated to disclose this to its clients. As put by one of them, "[I]t's not my job to inform a prospective client that he needn't employ a lawyer to handle his work." (App. 112-13). In much the same spirit, appellants make no systematic effort to determine whether their clients are eligible for the (free) Legal Aid service (App. 88). The price for adoptions with uncontested

severance is \$225, and Justice Gordon queried whether it was "deceptive to advertise legal services in connection with an uncontested adoption proceeding when by statute the County Attorney, upon application, is required to perform similar services without expense to the petitioner."

Appellants' trade did increase after the ad; see Ex. 17 (App. 479), which lists a number of cases "opened due to advertising." This two-column, eight-inch ad was accompanied by a news story on page 1, and other news stories following it, and appellants acknowledged that they had no way of knowing whether their business boost was due to the ad or the stories (App. 228-29; 230-31).

#### SUMMARY OF ARGUMENT

The power of the state to forbid advertising of professional services has been universally recognized; this Court dismissed the last appeal here on free speech grounds for want of a substantial federal question; *Toole v. State Board of Dentistry*, 316 U.S. 648, 62 S. Ct. 1299, 86 L. Ed. 1731 (1942), following the lead decision of Chief Justice Hughes in *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 612, 55 S. Ct. 570, 79 L. Ed. 1086 (1935). While no case in this Court has deviated from this conclusion, Footnote 25 in *Prescription Drugs, supra*, seems to warrant a fresh look at the whole topic and so we take that look here.

At the same time we rely on the train of thoughtful opinions in the past as our prime authority. Were Chief Justice Hughes now to be overruled, we believe it would be the first time for any of his powerful civil liberties opinions. We have gone back to the briefs in *Semler* which demonstrate that if the great Chief Justice were ever thoughtless or accidental, which we doubt, he was surely not so here.

Nonetheless we go behind established law to first principles. If there are to be special rules for the professions, we must first know what a profession is and so we analyze

the sociological literature to recognize the core elements of professionalism. Those elements can be clustered around four essentials: the first, a special training and long experience required beyond the usual callings of life; second, an ideal of service to the public and the client which puts a limitation on normal trade acquisitiveness; third, the performing of services which are sufficiently beyond common understanding that the public frequently can neither know what it truly wants nor evaluate what it has received, thus creating special problems of social control and avoidance of deception; and fourth, that the professions have a certain autonomy, dignity and status which together create, in the sociological phrase, the *esprit de corps* of a sub-culture.

These are real things. Plato, who thought of professionals as healers and navigators, was the first to discuss the difficult problem of balance between service and gain for a professional man. Professionals sacrifice many liberties of speech besides the sacrifice of advertising; for one illustration, the oldest restriction on professional speech is the provision in the Oath of Hippocrates on maintaining confidences; lawyers keep the same tradition.

Dacey, like Plato an observer outside the profession, recognized that professionals must "sacrifice a certain amount of individual liberty in order to insure certain professional objectives."

Given the definition and concept, we turn to historical analysis. In the nineteenth century in America the profession both permitted solicitation including advertising and failed badly to achieve its standards of service. We discuss the relationship of these conditions not as cause and effect but as companion evils. We advance the argument that advertising conflicts with the essences of a profession. For all of the failures of the profession (and they are conceded) we do find that it performs great service quite incompatible with that commercialism of which advertising is the very

spirit.

We turn then to the problems of "balancing" in connection with commercial speech which is mandated by the opinion of this Court in *Bigelow v. Virginia*, 421 U.S. 809, 825 n.10, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975). We advance the argument, following Chief Justice Hughes, that professional advertising is inherently deceptive. We demonstrate with specific references that this deceptiveness is uncontrollable and that it is an outright invitation to fraud and overreaching. We argue that advertising is incompatible with every element of a profession which makes a profession worthwhile as a calling, except money-making. While, without doubt, the public service of the law is not enough and community needs are not met by existing institutions, advertising will make a bad matter worse. There is no good answer to the opinion of Chief Justice Traynor that the prime victims of legal advertising will be the very persons whom these appellants earnestly seek to aid.

On the antitrust aspect of the case, we deal with express state enforcement of an express state rule, not with private conduct; we are squarely within the rule of *Parker v. Brown*, *supra*, and nothing in *Cantor v. Detroit Edison Co.*, 96 S. Ct. 3110 (1976), which deals with the action of private individuals is involved. Even if the advertising restriction were not exempt, it would be a reasonable restraint.

## ARGUMENT

### I. *The Ethical Standard Does not Conflict With First Amendment Rights.*

We approach the constitutional question from three standpoints: first, the decisions; second, the professional tradition from the standpoints of sociology, history, and practice; and third, the balance of values.



A. *The Cases Overwhelmingly Support the Canon.*

Viewed from a standpoint simply of case law, the question is whether *Prescription Drugs*, under the guise of putting the question aside in Footnote 25, somehow overruled or rejected the fifty or more years of decisions which have upheld prohibitions on professional advertising. We think not.

Restrictions on professional advertising were expressly upheld in *Semler v. Oregon State Board of Dental Examiners*, *supra* at 612. The Supreme Court, through Chief Justice Hughes, there stressed proper community concern with the maintenance of professional standards:

"... And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards."

*Semler* has been repeatedly followed. Appellants' Brief at 52-53 recognizes that *Semler* is adverse, but minimizes it as not a free speech case. The *Semler* factors are indistinguishable from the "balancing" factors applicable to "commercial" speech, as is developed below, and in any case, the issue was raised in free speech terms in *Toole v. State Board of Dentistry*, *supra*, which, resting precisely on *Semler*, found no violation of rights to free speech in such a restriction. What is important about *Toole* is that this Court dismissed the appeal in that case for want of a substantial federal question, 316 U.S. 648, 62 S. Ct. 1299, 86 L. Ed. 1731 (1942), citing *Semler* as authority.<sup>1</sup>

<sup>1</sup>Treating *Semler* for the authority the 1942 Court thought it was, Justices who have upheld professional advertising restrictions on speech include Chief Justices Hughes and Stone and Justices Brandeis, Cardozo (cited to the same effect in another leading case *infra*), Black and Douglas, some of the foremost exponents of free speech ever to sit here.

In this area new times have not brought new law. An abortion clinic may disseminate abortion information by advertisement, *Bigelow v. Virginia*, *supra* at 825 n.10, but the note cited says, "Our decision also is in no way inconsistent with our holdings in the Fourteenth Amendment cases that concern the regulation of professional activity," citing, *inter alia*, *Semler*.<sup>2</sup> *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975), cited seven times by appellants, said at 421 U.S. 773, 792-93, "We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession,' " citing, among other cases, *Semler*.

California decisions of great authority reinforce this interpretation of the federal rule. Present California Disciplinary Rule 2-101 expressly prohibits advertising as a means of soliciting professional employment. While the number of exceptions has grown, they are immaterial here and the fundamental rule is as it has been for 50 years. The rule was upheld in *Barton v. State Bar*, 209 Cal. 677, 681-83, 289 P. 818, 820 (1930), as necessary to the "fidelity, honesty, and integrity of the profession." *Mayer v. State Bar*, 2 Cal. 2d 71, 39 P.2d 206, 208 (1934), describes advertising as "utterly intolerable."

Lest this be derided as merely ancient wisdom, we bring it closer to date. Chief Justice Traynor, dissenting in *Hildebrand v. State Bar*, 36 Cal. 2d 504, 225 P.2d 508, 518, 519 (1950), used language directly applicable here: "Clients who need legal assistance only rarely, and are therefore inexperienced in selecting counsel, may be induced by advertising to select unsuitable counsel, with consequent injury not only to themselves but to the reputation of the bar as a

<sup>2</sup>*Bigelow* rests heavily on the fact that those advertising in Virginia were offering services in New York, and that neither the persons performing the services nor those utilizing them were subject to discipline in Virginia; 95 S. Ct. at 2234.



whole." *Belli v. State Bar*, 10 Cal. 3d 824, 112 Cal. Rptr. 527, 519 P.2d 575 (1974), considered advertising in the light of First Amendment principles. It held that Belli could solicit lectures but could not engage in communications principally directed to generating business for his law practice. A few months later, the same California Supreme Court issued its current disciplinary rule, essentially similar to Arizona's, prohibiting advertising by the Bar.

### 1. Commercial Speech.

We are dealing here with the purest imaginable commercial advertising. The appellants avowedly are advertising for the purpose of bringing in more money (App. 120-22, 128), and while they clearly think they are engaged in activity of some nobility in offering their services at a low price (App. 75-76, 123), the immediate object of this advertisement is to increase the flow of dollars into their pockets. The appellants offer simple services in this particular advertisement but they are also engaged in the personal injury practice (App. 71-72). In bringing in clients for the uncontested divorces, which may well be pure loss leaders, they may also pick up wills, probates and personal injury cases involving persons of very substantial means. As concrete evidence of the pure commercialism of the advertising process, we recall from the Statement of Facts that appellants find no necessity or duty to tell those who respond to their ad that they are paying a price which, in fact, may be totally unnecessary.

When the glow of self-righteousness is stripped off this advertisement and the business with which it is connected, we have nothing other than a cut-rate market on selected services, a bargain in some instances and not in others.<sup>3</sup>

<sup>3</sup>The ad does not involve solicitation of legal business for political purposes, *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963), nor is there any aspect of group legal services and communications necessary for that purpose, as with labor union-sponsored legal services, *United Mine Workers v. Illinois Bar*, 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967); this case has no relation at all to the "basic

What was said earlier is sufficient to sustain the prohibition so far as the free speech attack is concerned on the basis of decisions aimed squarely at professional practices. The same result could have been reached by viewing the advertisement here as a matter of "commercial speech," long held to be subject to greater control than those forms of speech which present ideas. See *Valentine v. Chrestensen*, 316 U.S. 52, 54, 62 S. Ct. 920, 86 L. Ed. 1262 (1942), which expressly holds that the traditional limitations of the First Amendment do not apply to "purely commercial advertising." See also *Breard v. City of Alexandria*, 341 U.S. 622, 71 S. Ct. 920, 95 L. Ed. 1233 (1951), a case upholding limitations on door-to-door solicitation by magazine salesmen, with which compare the testimony recited in the Statement of Facts in this case that the appellants reserve their position on their right to distribute the same advertisement door-to-door or put it directly into the hands of the injured.<sup>4</sup>

More recent decisions modify this power to control purely commercial speech, but do not give it the same insulation as "ideaful" speech. In the cigarette smoking advertising case, *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 584 (D.D.C. 1971) (3-judge court), *aff'd without opinion*, 405 U.S. 1000 (1972), the court noted that "product advertising is less vigorously protected than other forms of speech." We believe the sound view to be that of Judge Hufstedler, concurring in *Rowan v. United States Post Office*, 300 F. Supp. 1036, 1042, 1044 (C.D. Cal. 1969) (3-judge court),

right to group legal action." *United Trans. Union v. State Bar of Mich.*, 401 U.S. 576, 585, 91 S. Ct. 1076, 28 L. Ed. 2d 339 (1971); and see similarly *Bro. R. Trainmen v. Virginia State Bar*, 377 U.S. 1, 84 S. Ct. 1113, 12 L. Ed. 2d 89 (1964).

<sup>4</sup>*Cf.*, however, *Martin v. City of Struthers*, 319 U.S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943), where door-to-door solicitation is upheld when it is religious literature which is being distributed; and see *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) ("commercial" speech of clear social value protected).

*aff'd*, 397 U.S. 728, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970).

"The degree to which the First Amendment applies to protect speech varies with society's interest in the content of that speech. 'Purely commercial advertising' has never received the same kind of constitutional protection as that afforded to expressions of greater public concern. The commercial element does not altogether destroy its quality as protected speech, but it does substantially reduce the weight of the expression on constitutional scales. . . ."

Prior to the *Prescription Drugs* decision the last word on the subject had been *Bigelow v. Virginia*, *supra*, the case involving an advertisement in Virginia for a New York abortion referral service. That advertisement was held to give information on the "availability of legal abortions" so that "appellant's First Amendment interest coincided with the constitutional interests of the general public." Nonetheless the Court concluded that: "Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest." 95 S. Ct. at 2233, 2234.

## 2. *Prescription Drugs*:

This important decision on May 24, 1976, held that the Virginia statutory bans on advertising prescription drug prices violated the First and Fourteenth Amendments.

Justice Blackmun's opinion noted that pharmacists are substantially trained. At the same time the advertising prohibition was not "confined to prescriptions that the pharmacist compounds himself. Indeed, about 95% of all prescriptions now are filled with dosage forms prepared by the pharmaceutical manufacturer." 96 S. Ct. at 1821. Prices varied widely for identical doses of these identical drugs.

In these circumstances, Justice Blackmun's opinion sharply restricted the concept that speech is automatically subject to regulation because it is "commercial." He declared that Virginia may not keep "the public in ignorance of the

entirely lawful terms that competing pharmacists are offering." The flow of price information is "protected by the First Amendment . . . ." 96 S. Ct. at 1830. While the states could deal "effectively" with "deceptive or misleading" information it could not "suppress the dissemination of concededly truthful information about entirely lawful activity. . . ." 96 S. Ct. at 1831.

For purposes of this case, the most important passage of *Prescription Drugs* is Footnote 25, 96 S. Ct. at 1831. The footnote warrants complete repetition:

"We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising."

Chief Justice Burger, concurring, made special reference to note 25 to observe that "quite different factors would govern were we faced with a law regulating or even prohibiting advertising by the traditional learned professions of medicine or law. . . . Attorneys and physicians are engaged *primarily* in providing services in which professional judgment is a large component, a matter very different from the retail sale of labeled drugs already prepared by others." 96 S. Ct. at 1831-32.

The concurrence of Justice Stewart does not bear directly on this point; the dissent of Justice Rehnquist does cover the entire subject.

Chief Justice Burger observed that *Prescription Drugs* "deals largely with the state's power to prohibit pharmacists from advertising the retail price of prepackaged drugs."



He said further, "The advertisement of professional services carries with it quite different risks than the advertisement of standard products."

This distinction was pursued closely in this record with appellants' own economist witness, Professor Steven Cox of Arizona State University. Professor Cox affirmatively testified that price advertising would benefit consumers, as demonstrated by a study of the effect of advertising drugs, Ex. 13, and eyeglass frames, Ex. 14. On cross-examination, Professor Cox described the drugs as standard items purchased from national manufacturers. When the druggist gets a prescription "[H]e simply goes to the shelf; gets a large bottle; pours out some standard items and puts them in a smaller bottle and hands them over and charges some money." (App. 197). With the eyeglass purveyor, the function is equally mechanical; the product consists of frames and lenses manufactured nationally (App. 199-200). So far as the pharmacist is concerned, the extent of his professionalism on these products is, "He has to be able to read, and he has to be able to count." (App. 202). These are "the most standardized items that could conceivably be found." (App. 202).

The same witness was then examined as to how he would study the effect of advertising on the price for legal services. The matter for illustrative analysis was an appeal of a murder case (App. 204). The first step, according to the witness, is to standardize "the lawyer doing the appeal" (App. 205);

"[Y]ou can try to get two degrees of lawyers as comparable as possible, the same number of years, the same number of cases handled on appeal, the same number of cases won . . . ." (App. 207)

On further cross-examination, when the witness had been informed of the hopelessly nonstandard nature of murder cases, he was asked whether there were "any empirical studies which have been made of the effect of advertising

on the price of wholly nonstandard items." He answered "No, and it would be inappropriate to do so." (App. 209-10).

As this Court noted, 95% of the prescription drugs sold are nationally manufactured identical items; and we would wager that there won't be any advertising of the remaining 5% which require individual preparation. These are sales of simple standard products, not services. The kindest thing that can be said for the notion that handling murder appeals is on a par with dishing out Darvon is that it is foolishness. When in Footnote 25 in *Prescription Drugs*, this Court declared that it was not deciding the lawyer's case, we believe it. When it said that "the distinctions, historical and functional, between professions, may require consideration of quite different factors," we accept the declaration and in the balance of this argument will consider those "quite different factors." When this Court declared that "physicians and lawyers, for example, do not dispense standardized products," we read it to declare that *Prescription Drugs* is a determination as to standardized products and not as to professional services.

#### B. *The Professional Tradition.*

*Goldfarb v. Virginia State Bar, supra*, while it upholds antitrust restrictions on fee fixing, continues to recognize the force of professional traditions on ethical practices of the professions:

" . . . It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. . . ." 95 S. Ct. at 2013 n.17.

This is also true of free speech concepts, and so we turn



to an analysis of the "features of the professions."

The existing provision of the Code of Professional Responsibility traces its way to the Canons of Ethics as adopted in 1908 by the American Bar Association. Advertising has been deemed obnoxious throughout the twentieth century.<sup>5</sup>

The new proposal is that the profession radically change its relation to the community. This Court must assess "the First Amendment interest at stake and [weigh] it against the public interest allegedly served by the regulation." *Bigelow v. Virginia*, *supra* at 826.<sup>6</sup> We therefore lay the foundation for that balancing function. In so doing, we appreciate that one must not confuse the familiar with the necessary, that the best of traditions may outlive their usefulness, and that the tradition against advertising must be justified on its merits as a continuing rule for our times.

What is proposed seems simple enough: a profession which, with an irregular pattern marked by great deviation in the 1900's, has thought solicitation improper should now go out looking for business by advertising. To perceive the

<sup>5</sup>Advertising was permitted in the American practice in the nineteenth century and was limitedly used, though not in appellants' fashion. For an earlier example, Thomas Jefferson and a number of other lawyers notified the public that legal work would not be done without payment of fees; 1 *The Papers of Thomas Jefferson* 98 (J. Boyd & M. Bryan eds. 1954) (original 1773). English barristers in the eighteenth century had a fixed practice against soliciting. Samuel Johnson believed that where litigation was inevitable, a lawyer might as well endeavor "that he shall have the benefit, rather than another," though he would "disdain" to do so himself. J. Boswell, *Life of Johnson* 683 (Oxford Standardized ed. 1953). The profession regards advertising as a subdivision of solicitation and so does medicine (Helme Dep., App. 28-29) and accounting (Davidson App. 44); in this view the prohibition of solicitation covers advertising as one particular means of soliciting. The architects, on the other hand, bar advertising but do not prohibit certain other forms of solicitation (Arnold, App. 149-50).

<sup>6</sup>This decision is expressly said to be "in no way inconsistent" with, *inter alia*, *Semler*, 95 S. Ct. at 2234n.10.

consequences—to strike the balance—we need to know what a profession is, particularly this one, and how the proposed course would affect the profession and the public.

### 1. *The Concept of Professionalism.*

We begin with the definition of a profession.

We do so with the recognition that the borders between professions and trades are not sharply fixed. Near the margins we have problems. In *Prescription Drugs*, the activity in question achieved its professional status in part by stipulation; see 96 S. Ct. 1820 n. 3. At the same time, as the opinion makes clear, neither the training nor the functions there involved are at the same level of professionalization as medicine, to which pharmacy is so closely connected. The occupations of a society distribute themselves along a continuum, but clearly law is at the inner core of any definition of profession.<sup>7</sup>

<sup>7</sup>E. Krause, *The Sociology of Occupations* 75-76 (1971), adopts the usual view that the classic professions are medicine, law, clergy, and the military. The debasement of the label "professional" to mean little more than "expert" by endless extension of the category is extensively discussed in R. Lewis & A. Maude, *Professional People in England* (1953). On "professions" and "non-professions" see W. Goode, discussing librarianship in *Professionalization* 33 (H. Vollmer & D. Mills eds.) (Prentice-Hall, Inc. 1966), hereafter cited as *Vollmer & Mills*. In the same work see E. Sutherland, *Professionalization in Illegitimate Occupations* (Professional Theft) 28. On the development of the "continuum" analysis, see E. Greenwood at *Vollmer & Mills* 10. He notes that the U.S. Census Bureau divides occupations into six categories ranging from professionals and semi-professional technical workers to unskilled laborers and domestic workers, and he enumerates more than a dozen professions listed by the Census Bureau.

DIAGRAM 1  
The Process of Professionalization in the United States<sup>8</sup>

Profession	Became full-time occupation	First training school	First university school	First local professional association	First national professional association	First state license law	Formal code of ethics adopted
<b>Established</b>							
Accounting (CPA)	19th cent.	1881	1881	1882	1887	1896	1917
Architecture	18th cent.	1865	1868	1815	1857	1897	1909
Civil Engineering	18th cent.	1819	1847	1848	1852	ca. 1910	ca. 1910
Dentistry	18th cent.	1840	1867	1844	1840	1868	1866
Law	17th cent.	1784	1817	1802	1878	1732	1908
Medicine	ca. 1700	1765	1779	1735	1847	Before 1780	1912
<b>Others in process (some marginal)</b>							
Librarianship	1732	1887	1897	1885	1876	Before 1917	1938
Nursing	17th cent.	1861	1909	1885	1896	1903	1950
Optometry	—	1892	1910	1896	1897	1901	ca. 1935
Pharmacy	1646	1821	1868	1821	1852	1874	ca. 1850
Teaching	17th cent.	1823	1879	1794	1857	1781	1929
Social work	1898(?)	1898	1904	1918	1874	1940	1948
Veterinary medicine	1803	1852	1879	1854	1863	1886	1866
<b>New</b>							
City management	1912	1921	1948	After 1914	1914	None	1924
City planning	19th cent.	1909	1909	1947	1917	1963	1948
Hospital administration	19th cent.	1926	1926	—	1933	1957	1939
<b>Doubtful</b>							
Advertising	1841	1900	1909	1894	1917	None	1924
Funeral direction	19th cent. ca.	1870	1914	1864	1882	1894	1834

The question remains as to what the concept of professionalism is.

Any definition broad enough to include both theologians and military generals must necessarily be highly abstract, and the definitions even among the specialists are not uniform. Putting together the key elements from four sources, a profession may be defined as an occupation which requires "the possession of esoteric but useful knowledge and skills, based on specialized training or *education* of exceptional duration and perhaps of exceptional difficulty. . . . [T]he professional is expected to exhibit a *service orientation*, to perceive the needs of individual or collective clients that are relevant to his competence and to attend to those needs by competent performance. Finally, in the use of his exceptional knowledge, the professional proceeds by his own judgment and authority; he thus enjoys *autonomy* restrained by responsibility."<sup>9</sup> Again, "[A]ll professions seem to possess: (1) systematic theory, (2) authority, (3) community sanction, (4) ethical codes, and (5) a culture. . . ."<sup>10</sup>

What is referred to in the passage just quoted as a culture is more sharply defined as, "the existence of a vocational sub-culture which comprises explicit or implicit codes of behaviour, generates an *esprit de corps* among members of the same profession. . . ."<sup>11</sup>

<sup>9</sup>W. Moore, *The Professions: Roles and Rules* 6 (Russell Sage Foundation, 1970). N. Elias, "Professions" in *Dictionary of the Social Sciences* 542 (J. Gould & W. Kolb eds. 1964), defining the term as "occupations which demand a highly specialized knowledge and skill acquired at least in part by courses of a more or less theoretical nature and not by practice alone, tested by some form of examination either at a university or some other authorized institution, and conveying the persons who possess them considerable authority in relation to 'clients.'" E. Krause, *supra* at 76, similarly notes that the "professionals must control their clients."

<sup>10</sup>E. Greenwood, *Social Work*, in Vollmer & Mills, *supra* at 10.

<sup>11</sup>Quotation from C. Turner & M. Hodge, *Occupations and Professions in Professions and Professionalization* 24 (J. Jackson ed. 1970).

<sup>8</sup>M. Zald, *Occupations and Organizations in American Society* 20-21 (1970) (footnotes omitted).

It is a "community within a community."<sup>12</sup>

Professional and non-professional distinctions are illustrated in the table following:<sup>13</sup>

DIAGRAM 2

*Continua in the Professional Ideal Type*

<i>Non-Professional</i>		<i>Professional</i>
Technical, Craft skill	Knowledge	Broad, Theoretical knowledge used in
Routine	Tasks	Non-routine situ- ations to reach
Programmed	Decision- making	Unprogrammed decisions accord- ing to
Ends decided by society (or other institution)	Authority	Ends (derived from knowledge) decided for society (or in- stitution within it) and supported by
Other or non-work	Identity	Occupational Group because work and occupation are
Means to non- work ends	Work	Central life interest and are also the basis for
Occupational/ Class advancement	Career	Individual achieve- ment which involves meeting initial en- try qualifications through
Limited	Education	Extensive Educa- tion, showing skill and meeting other latent status re- quirements in- volved in the
Specific	Role	Total Role (that is expectations extend beyond expertise and work situation)

<sup>12</sup>Goode, *Community Within a Community: the Professions*, 22 *Amer. Soc. Rev.* 194 (1957).

<sup>13</sup>P. Elliott, *The Sociology of the Professions* 96 (1972).

The argument following develops that advertising is incompatible with most of the activities and values in the professional column.

The systematic body of knowledge of professionals is applied to the problems:

"... highly relevant to central values of society. Their high degree of learned competence creates special problems of social control: Laymen cannot judge the professional performance; in many cases they cannot even set the concrete goals for the professional's work. This means that the two most common forms of social control of work in industrial societies, bureaucratic supervision by virtue of a formal position and judgment by the customer, are of only limited applicability. The need for social control is, on the other hand, especially urgent because of the values and interests that are at stake."<sup>14</sup>

Given the limitation just quoted, the same author moves to what this case is all about. How can society cope with the problem that social control of a profession is needed and yet difficult because the normal methods don't work? The answer is by harnessing the *esprit de corps* of the subculture:

"The dilemma is solved by a strong emphasis on individual self-control, which is grounded in a long socialization process designed to build up the required technical competence and to establish a firm commitment to the values and norms central to the tasks of the professional. The values and norms are, furthermore, institutionalized in the structure and culture of the profession. Individual self-control is therefore supplemented by the formal and informal control of the community of colleagues. Accepting the pledge to a self-controlled 'collectivity orientation' as trustworthy, society grants in return privileges and advantages, such as

<sup>14</sup>D. Rueschemeyer, *Doctors and Lawyers: A Comment on the Theory of the Professions in Sociological Perspectives on Occupations* 27 (R. Pavalko ed. 1972).



high income and prestige, and protects the profession's autonomy against lay control and interference. . . ."<sup>15</sup>

It is precisely the operation of this sub-culture which appellants seek to upend. The Code of Professional Responsibility, including the Rule in question, has emerged from very long experience as a means needed to maintain the proper operation of a system of distribution of community services. The regulations ("ethical standards") are presented by the profession to the leadership constituted for it by the State, in this case the State Supreme Court.<sup>16</sup>

There are three other distinguishing features to be mentioned. Professions give to their members a certain traditional status and dignity. It was the first means by which those without inherited wealth could make a living except by manual labor. Second, "the term usually denotes certain occupations whose members give service rather than engage in the production and distribution of goods."<sup>17</sup> Finally, the concept involves the ideal of service. A classic and often reprinted analysis by Professor Robert MacIver is credited with first developing the concept that a singular aspect of professions is the degree of their own autonomy and collective self-control over their standards of performance and behavior. This he found an auxiliary to the ideal of service, of which discussion will follow.<sup>18</sup>

## 2. *Brief Historical Overview of This Profession.*

We have defined the professions, of which theology, medicine and law are the most ancient in sociological terms, and now speak briefly of the history of this profession.

<sup>15</sup>*Id.*

<sup>16</sup>The Arizona Supreme Court does in fact utilize discriminating judgment in deciding which portions of recommended ethical codes to select as the law in Arizona, as is developed below.

<sup>17</sup>N. Elias, *Dictionary of the Social Sciences*, *supra*.

<sup>18</sup>R. MacIver, *Professional Groups and Cultural Norms* in Vollmer & Mills, *supra* at 51-52.

The profession began in the teaching of it; in Roman times there were no law schools, no requirements for admission, no license to practice. Nonetheless there was knowledge to be gained for those who would perform this service. "Scaevola taught Cicero, who in turn taught Caesar and Brutus and became the model for Quintilian and succeeding generations."<sup>19</sup> This teaching function was institutionalized in England so that by the fourteenth century English apprentices studied the common law at the Inns of Court in London. Completion of the studies qualified the student to practice.<sup>20</sup> By the seventeenth century the solicitors had separated from the barristers and lost their ties to the Inns of Court. Because they were not organized, they lost much of their professional tradition, discipline and organization, whereas the barristers became, through their societies, a well-developed, well-organized, well-educated profession.<sup>21</sup>

Lawyers came early to America, trained in the English tradition, and in 1710 Cotton Mather gave us the first recorded American statement on the special need to balance between professional service and professional income. The lawyer, said Mather, had a capacity to do good. Speaking to the lawyers of the new land, he said:

"Your opportunities to do good are such, and so liberal and gentlemanly is your education . . . that proposals of what you may do cannot but promise themselves an obliging reception with you. . . . When you were called upon to be wise, the main intention is that you may be wise to do good. . . . A lawyer must shun all

<sup>19</sup>R. Wilkin, *The Spirit of the Legal Profession* 17 (1938). The Oath of Hippocrates makes teaching the first duty of the doctor; 11 *Encyc. Brit.* 827.

<sup>20</sup>R. Pound, *The Lawyer From Antiquity to Modern Times* 85 (1953).

<sup>21</sup>*Id.* at 86, 93.

those indirect ways of making haste to be rich, in which a man cannot be innocent."<sup>22</sup>

Side by side with Mather's concept of the good man grew another conception of a lawyer in America. This was the knave, the spellbinder, the pettifogger. Frequently these were persons who stirred up litigation for the sake of the fees, "the man of easy penmanship and clever volubility."<sup>23</sup> At the time both of the Declaration of Independence and the Constitution, the balance of public opinion still favored lawyers and the weight of esteem recognized the value of the good. Twenty-five of the fifty-six signers of the Declaration of Independence and thirty-one of the fifty-five delegates to the Constitutional Convention were lawyers. But after the Revolution, this esteem disappeared. Lawyers "were denounced as banditti, as blood-suckers, as pick-pockets, as windbags, as smooth-tongued rogues."<sup>24</sup>

The post-Revolutionary attitude continued, and was deserved, for most of the nineteenth century. The hostility was accompanied by the breaking down of professional boundaries. Between 1800 and 1860 the proportion of the states making any requirement of professional qualification to become a practicing lawyer shrank from three-fourths to fewer than one-fourth; for illustration, in Indiana from 1851 until 1940's any person of good moral character could practice law.

As Roscoe Pound reviewed the nineteenth century, "In the era of decadence it was assumed for the first time in Anglo-American law that the bar was not to be regarded as a profession, with requirements for admission such as public policy may prescribe, but as a mere private money-making

<sup>22</sup>A. Chroust, *The Rise of the Legal Profession in America* X-XI (1965).

<sup>23</sup>*Id.* at 6.

<sup>24</sup>C. Warren, *A History of the American Bar* 216 (1966).

occupation."<sup>25</sup> During this period there were no inhibitions on lawyer advertising or indeed, any other inhibitions upon lawyers other than the general law as applicable to the entire society. In territorial Arizona, the practice was to publish classified cards. For illustration, on April 11, 1874, the *Arizona Citizen* in Tucson carried two columns of classifieds which noted two doctors, three attorneys, two dentists, a notary public, a stage station ("ample variety of well cooked food"), and an offer to "ranch" horses and mules at \$2.50 a month.<sup>26</sup>

We do not mean to suggest that the low state of the bar in the late nineteenth century was the product of the practice of advertising; it was simply the manifestation of a larger destruction. What had happened, as a sum of many factors, was that the whole concept of professionalism in law was on its way to extinction. The elements of education, honor and service were vanished or vanishing. In the Guilded Era the quick buck was the order of the day.

It was against this background that in 1905 the American Bar Association adopted its first code of ethics and recommended that professional ethics be taught in the law schools and be a subject of examination.<sup>27</sup> By 1922 an A.B.A. committee had begun the function of issuing the advisory opinions interpreting the Canons with which all are familiar.<sup>28</sup>

The twentieth century has seen vast changes in the practice, with giant offices sometimes soberingly described as factories. The rise of big government has created a large role for the government lawyer; these and other changes are legend. This ever-increasing prominence and prosperity of lawyers increases their social responsibility.

<sup>25</sup>For elaboration see Pound, *supra* at 232, 355.

<sup>26</sup>J. Murphy, *Law, Courts, and Lawyers* 55 (Univ. of Ariz. Press, Tucson, 1970).

<sup>27</sup>E. Sanderland, *History of the A.B.A. and its Work* 112 (1953).

<sup>28</sup>*Id.* at 113.

Concomitant with this growth in the twentieth century has been the effort to restore law as a profession. To put the matter back into the sociologist's terms, the effort has been to rebuild what had existed in America and England in the eighteenth century, a sub-culture with an *esprit de corps* capable of a quality of self-discipline which could lead once again to education, honor and service.

We preach no sanctimony here, no smug complacency. The path has been checkered and the failures disastrous. The profession took a step backward from which it will take decades to recover when the television eye in the great Water-gate scandals revealed lawyer after lawyer as a liar or cheat; but at least there is a comfort that it was an intra-professional fight. Those doing the revealing and exemplifying a pattern of morality in public affairs were lawyers, too.

The mid-century and beyond have put enormous demands on lawyers to make services available to the entire community. Inflation and the rising cost of legal services as matched against welfare and unemployment or the shrinking real incomes of the lower middle class and the retired have compelled a reconsideration of the means of distributing legal services. The fervor, mistaken we believe, with which the instant case is presented reflects these current demands. Happily the profession is responding, doing better as it learns how, with legal aid, lawyer referral and various forms of public interest practice. Honor, honesty and public service have taken some bruises; the most strenuous single criticism of the Code of Professional Responsibility is that it is not enforced often enough or hard enough to protect the public. Nonetheless, particularly in the rise of integrated bars in some twenty or more states of which Arizona is one, the profession seeks *as a profession* to meet new and unexpected responsibilities.<sup>29</sup>

<sup>29</sup>For discussion of the integrated bar see E. Griswold, *Law and Lawyers in the United States* 28 (1965).

### C. Professionalism, Service, and Revenue.

One of the key elements of the profession is a concept of service to the public and service to the individual client. This is a special sort of service, different from the general flow of commerce, serviceable as it also may be. This inevitably leads to the problem of balancing service and revenue. MacIver speaks of "the ethical problem of the profession . . . to fulfill as completely as possible the primary service for which it stands while securing the legitimate economic interest of its members. It is the attempt to effect this reconciliation, to find the due place of the intrinsic and of the extrinsic interest, which gives a profound social significance to professional codes of ethics."<sup>30</sup>

All contemporary expression from within the profession on the relation of the professional and his income, or the distinctions between professionalism and commercialism, are open to the charge of self-service. But Plato, in Book I of the *Republic* said much the same thing as Roscoe Pound in the twentieth century, and both are right.

Plato was talking to the cantankerous Thrasy-machus of professionalism and commercialism. For Plato, the obvious professionals were doctors and navigators, and he spoke of their "art." He developed the paradox: "Is the physician . . . a healer of the sick or a maker of money? And, remember I am speaking of a true physician." The answer is a healer of the sick, and it is agreed that "no physician, insofar as he is a true physician [read true professional] considers his own good in what he prescribes, but the good of his patient; for the true physician . . . is not a mere money maker."

Plato develops that these arts must be mastered by those who practice them, and that this mastery makes the professional into a kind of a ruler and the beneficiaries (or

<sup>30</sup>R. MacIver, *supra*.



clients) the subjects. In short, precisely as today, the client is inescapably dependent upon the judgment of the professional. Since the professional must be paid, there are two "arts"; the "art of medicine gives health," but there must be an "art of pay" as well.

Yet, "in the execution of his work, and in giving his orders to another, the true artist does not regard his own interest, but always that of his subjects." To be willing to do this, he "must be paid in one of three modes of payment, money, or honor, or a penalty for refusing."<sup>31</sup>

Thus, the Platonic paradox. The professional does not seek money, but he must have money. He must make the welfare of others be his first goal ("speaking of the true physician"). His compensation may be money or honor; he is subject to penalty if he fails properly to serve others.

Twenty-three hundred years ago that description did not fit, say, a potter. It did fit the professional, and it still does. In the same spirit, Roscoe Pound spoke of the distinctions between the legal profession and the trades; *R. Pound, The Lawyer From Antiquity to Modern Times* 6, 10 (1953):

"Historically there are three ideas involved in a profession: organization, learning, i.e., pursuit of a learned art, and a spirit of public service. These are essential. A further idea, that of gaining a livelihood, is involved in all callings. It is the main if not the only purpose in the purely money making callings. In a profession it is incidental.

"The best service of the professional man is often rendered for no equivalent or for a trifling equivalent and it is his pride to do what he does in a way worthy of his profession even if done with no expectation of reward. This spirit of public service in which the profession of law is and ought to be exercised is a prerequisite of sound administration of justice according to law. The other two elements of a profession.

<sup>31</sup>Plato, *The Republic*, Bk. I, as reprinted in 7 *Great Books* 303-06 (*Encyc. Brit.*, 1952).

namely, organization and pursuit of a learned art have their justification in that they secure and maintain that spirit."

The question must be faced whether these principles are simply self-serving pieties left over from an ancient day when "gentlemen" were officers of the court. In our own time our fellow professionals have the same problems as the rest of struggling humanity in paying the mortgage, buying the car, educating the children. We, as well as the shoemaker, must be in a "money making calling." At the same time, very generally, we perform professional services at low or no cost for those who need them. The Platonic dilemma of service and revenue is thus everlastingly with us.

#### 1. *The National Scene.*

Charles Darwin tells us that, "The more efficient causes of progress seem to consist of a good education . . . and of a high standard of excellence, inculcated by the ablest and best men, embodied in the laws, customs and traditions of the nation, and enforced by public opinion."<sup>32</sup>

An illustration of the Bar's effort to progress toward that high standard of excellence is the recent revision of the Code of Professional Responsibility, which, among other things, mandates the lawyer to promote the availability of competent lawyers for all, to aid in establishing and enforcing standards of professional conduct to protect the public, and to encourage and aid in making needed changes and improvements in our legal system.<sup>33</sup> Canon 8, headed, "A lawyer should assist in improving the legal system," breaks new ground in establishing as an actual ethical duty the responsibility to propose and support legislation and other programs to

<sup>32</sup>C. Darwin, *The Descent of Man* 49 *Great Books* 328, *Encyc. Brit.* (1952). Frank, *Canon 8 and a Rising Aspiration*, 48 *Texas L. Rev.* 380 (1970), hereafter referred to as *Canon 8*, develops the Darwin theme as applied to lawyers.

<sup>33</sup>Code of Professional Responsibility, *Canon 8*.

improve the system and its procedures.

Within the space of a brief it is impractical to make even a preliminary survey of the lawyer's contribution to public service and so we pause with only this one illustration. Canon 8 postulates as an ethical ideal a mandate to the Bar to use our skills in the social service of mankind by the everlasting improvement of the system with which we work.

In the Canon 8 essay, *supra*, an effort was made to determine the norm which should become the aspiration of lawyers seeking to live up to this standard. Inquiry was made of a small sample of the practitioners on the Council of the American Law Institute and the Committees of this Court, and from persons suggested by the Institute of Judicial Administration and others. Those answering are something of an honor roll of the law, though of course not even a significant partial list from among the thousands of lawyers giving time to these ends every year.<sup>34</sup> The list includes lawyers of from ten to fifty-seven years of experience and practitioners in small towns and great cities.

What have they done? Uniform state laws have been a

<sup>34</sup>Persons responding were: Walter P. Armstrong, Memphis, Tennessee; Joe C. Barrett, Jonesboro, Arkansas; Stuart B. Bradley, Chicago, Illinois; John G. Buchanan, Pittsburgh, Pennsylvania; Paul Carrington, Dallas, Texas; Homer D. Crotty, Los Angeles, California; Norris Darrell, New York, New York; Jordon A. Dreifus, Los Angeles, California; Burnham Enerson, San Francisco, California; Hicks Epton, Wewoka, Oklahoma; Arthur Freund, St. Louis, Missouri; Richard A. Givens, New York, New York; William T. Gossett, Detroit, Michigan; William A. Grimes, Baltimore, Maryland; Erwin Griswold, Washington, D.C.; DeWitt A. Higgs, San Diego, California; Charles Horsky, Washington, D.C.; Seth M. Hufstedler, Los Angeles, California; Albert Jenner, Jr., Chicago, Illinois; Robert A. Leflar, Fayetteville, Arkansas; William L. Marbury, Baltimore, Maryland; Orison Marden, New York, New York; Vincent L. McKusick, Portland, Maine; Robert W. Meserve, Boston, Massachusetts; W. Brown Morton, Jr., Washington, D.C.; Franklin M. Schultz, Washington, D.C.; Craig Spangenberg, Cleveland, Ohio; John A. Sutro, San Francisco, California; Theodore Voorhees, Philadelphia, Pennsylvania; Edward Wright, Little Rock, Arkansas.

consuming interest of the lawyer active in law improvement. So has procedural reform ranging from national to local rules. The responding lawyers have been deeply involved in improving the process of judicial selection and administration.

As those interested in adjusting the legal system to changing social realities, the leaders in law improvement are active in developing a means for bringing legal services to the poor. They may be members of the Special Committee of the ABA on Availability of Legal Services, promote lawyer referrals and group legal services, work for the provision of legal services for the indigent in criminal and civil matters, reform laws governing landlord-tenant relations, assure equal opportunity in housing, education and employment, act as President of the National Legal Aid and Defender Association, or participate on the National Advisory Committee of the OEO Legal Services Program.

These activities of typical leaders in law improvement reflect the high standards by which they abide. They also participate in formally setting ethical standards for the entire profession. As Chairmen and members of the ABA Professional Ethics Committee, they undoubtedly influenced all the Canons, including Canon 8, which sets the standard of which they are prime examples. Such lawyers might have participated in the Special Committee of the ABA on Evaluation of Ethical Standards, improving Congressional ethics, setting ABA standards for disciplining lawyers' misconduct, or as Chairmen and members of the Committee that produced the Code of Professional Responsibility.

Canon 8 is essentially a call to the profession to give time, and unless the lawyers who are carrying Canon 8 duties are willing to give materially of their time, they may as well not start. The average number of hours given to law improvement annually among the lawyers surveyed was 350 and the average percentage of their total working time was



20%. They could sell all of their time if they wished. If we assume that the time given could have been charged at fifty dollars an hour (in the circumstances a deliberately low figure) then the average dollar contribution in time of each is \$17,500. Their associates are also participating. One firm, for example, reports, on the basis of closely kept statistics, over 5,000 hours a year in defense of prisoners and in both Bar-oriented and other law reform projects. The dollar measure is staggering. As Mr. William Gossett, a distinguished leader in Bar public service, has said, a particular individual may meet his responsibility "through his firm, by financing the activities of some of his partners or associates in law improvement efforts." Mr. Gossett estimates a 5% to 10% time allocation as a minimum, the amount rising with age and experience as the lawyers become capable of making a greater contribution.<sup>35</sup>

## 2. *The Arizona Bar and Public Service.*

Arizona is a brilliant demonstration of this professional tradition. For purposes of determining whether, at this point in the late years of the twentieth century and in Arizona, the law is still being practiced as a public calling, we have polled a substantial portion of the Bar of Central Arizona; the results are in the record as Ex. 2, at p. 245 of the Appendix. The survey covered 16% of the lawyers in Central Arizona. The firms represented range from as few as a half dozen to fifty or more lawyers. All the firms have grown within the past twenty-five years from a very few lawyers, if they existed at all, to their present size. None has advertised.

The public service work of these firms can be divided into work of the kind contemplated by Canon 8, the obligation to improve the law itself and charitable work in the representation of clients.

<sup>35</sup>Canon 8 essay, *supra* at 396

The work of these firms includes participation in educational seminars, administering the Bar exams, serving in responsible ways with substantive law ABA committees and legal writing. In one firm which over the years has included two presidents of the Association of Trial Lawyers of America, the time of an individual given to professional and public service has reached 100% for substantial periods. Rule making, uniform jury instructions, revisions of the Internal Revenue Code, reorganization of the justice courts, American Law Institute work, revision of the Uniform Commercial Code in Arizona and the preparation of other codes have been activities of some firms. One firm includes a member of the Board of Directors of the National College of the State Judiciary which puts him constantly on the move for public service meetings in various parts of the country. One lawyer initiated the Citizens Conference which led to the adoption of merit selection of judges in Arizona.

We say with some small measure of justified pride that Arizona has been one of the most progressive states in the country in the field of procedure. It is not immodest for the Bar to take pride in the fact that it has assisted its Supreme Court in that work.

Appellants pride themselves in having done some free work (Appellants' Br. 6). They thus join the club of Arizona lawyers. The firms queried have also been very active in the affairs of the Legal Aid Society; one of them for almost two years operated a branch of the Legal Aid office on a regular basis. Several of the firms advise or represent at reduced fee, or no fee, individuals and organizations who warrant help; one firm gives a full 10% of its time to *pro bono* work. One firm has served as Arizona counsel for the United Farm Workers without charge and another is actively involved in the Lawyers Referral Program. One firm has represented low income minority group home buyers and has counseled many poor persons at special rates on workmen's compensation and tax problems; another has given legal



services to the Arizona Foundation for the Handicapped, the Seventh Step Foundation, and the Northside Mental Health Project.

One firm can recount one hundred and fifty instances in the past year of completely free services to the indigent and several others have liberally served the poor. The firms have served churches and church-related societies, as well as other charities; one reported that its time contribution for the past ten months to legal aid services had been \$21,736, and reported a court appointment to represent the prisoners at the State Penitentiary on disciplinary matters at total hourly costs of \$19,300.

What all this comes to is that even in an age of computers and high taxes and electric typewriters and social security and group health and enormous libraries and all the rest, if a measure of a profession is, as Dean Pound said, that it truly provides a public service, then the Bar of Arizona is a profession.

#### D. *Direct Injury to the Public by Solicitation.*

The substance of the argument in divisions D and E of this brief is that advertising is in fact directly destructive of the public interest, and is indirectly injurious to the public by being destructive of the profession.

##### 1. *The Problem of Deception and Fraud.*

The suggestion that the states should not prohibit all lawyer advertising, but rather merely control that which is deceptive, is an evasion of reality. Under existing disciplinary procedures, there is no possible way in which vast numbers of advertisements could be inspected and enforcement proceedings be brought to handle those which are misleading. On the practical problems of administration of discipline, see the deposition of Arizona State Bar President Harrison (App. 383-93). The creation of an entirely different enforcement system would be required, a

burden to which neither the general public nor the clients should be put. The advertisement in question itself illustrates the problems of what is deceptive and what is not. Here services are presented as somehow special and a bargain and advantageous because the firm is called a "clinic" when, by the direct testimony of the Appellants, they have no definition whatsoever for that term (App. 84-85) and their practice is indistinguishable in method of operation and services performed from any other law office; it is simply, hopefully, a cut-rate operation. As Justice Gordon below observed, the suggestion that some kind of a bargain is being offered for one of the services is probably itself deceptive outright since the charge, whatever it is, is more than is necessary for persons of reasonable intelligence; and the divorce price in some cases is excessive.

Appellants' Brief at 46-48, contends that some lawyer's work, some hourly rates, permit of advertising without being deceptive, and that "it is inconsistent with the First Amendment to ban *all* advertising simply because some of it might be misleading." Chief Justice Hughes saw this differently and would not require the Bar to make this kind of distinction between ads which are deceptive and ads which are not. As the testimony of Mr. Harrison (App. 371-81); of ATLA President Robert Begam (App. 291-92), (ATLA takes an even stricter view of advertising than some ABA members, App. 284-87); of Dr. Helme (App. 315-16); and of Mr. Arnold (architects) (App. 154-55) clearly shows, the heavy weight of professional judgment is that professional services cannot fairly lend themselves to advertising techniques without being necessarily deceptive. As Chief Justice Hughes expressly held in *Semler v. Oregon State Board of Dental Examiners*, *supra*, the professions need not attempt to sort out that advertising which is deceptive and that which is not, an impossible administrative task. As the Supreme Court said:

" . . . In framing its policy the legislature was not bound to provide for determinations of the relative proficiency

of particular practitioners. The legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule even though in particular instances there might be no actual deception or misstatement. *Booth v. Illinois*, 184 U.S. 425, 429; *Purity Extract and Tonic Company v. Lynch*, 226 U.S. 192, 201; *Hebe Company v. Shaw*, 248 U.S. 297, 303; *Pierce Oil Corp. v. Hope*, 248 U.S. 498, 500; *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388, 389." 294 U.S. at 612-13.

To give simply a hint of the magnitude of deception control, it takes the large staff of the Food and Drug Administration and a large appropriation to make some effort to control deceptive advertising in the drug industry although this is at least rendered a little easier because the bulk of the product is produced and advertised nationally, thus requiring control of only a limited number of sources. If individual doctors advertised, the administrative problem would be insuperable. We have perfectly hard experience here; it was phoney medical advertising which helped give rise to the limitations on professional solicitation in nineteenth century England.<sup>36</sup> We have more immediate experience that advertising of legal services is an open invitation to take advantage of the uninitiated.<sup>37</sup>

<sup>36</sup>See, W. Reader, *Professional Men, The Rise of the Professional Classes in Nineteenth-Century England* 159-60 (Basic Books, Inc. 1966). The author observes that the effort to stop doctors from advertising, while doubtless in part for reasons of self-interest, was also to get rid of outlandish medical advertising, which he illustrates.

<sup>37</sup>See Report and Recommendations of Special Committee on Lawyer Advertising, American College of Trial Lawyers, approved by its Board of Regents Aug. 6, 1976, p. 10:

"The dangers of allowing lawyer advertising have been tested in the past. Advertising by patent lawyers was allowed under Patent Office Supervision until 1952 and some four percent of the patent lawyers did advertise. However, as a result of the inability of the Patent Office to control abuses, advertising was

Advertising and solicitation result in fraudulent claims or practices; see *Settlement of Personal Injury Cases in the Chicago Area*, 47 Nw. U. L. Rev. 895-99 (1953); Note, *Ambulance Chasing*, 30 N.Y.U. L. Rev. 182-88 (1955). The leadership of the personal injury bar is emphatically opposed to advertising (App. 287-93). It is clear that these appellants draw back with a little embarrassment from the possibility of pressing their cards into the hands of the injured at the scene of the accident, but if they have the First Amendment right, as they assert, it is difficult to draw the line. So far as the message is concerned, its validity can scarcely depend upon whether it is printed in newsprint for circulation to hundreds of thousands, as was this advertisement, or is on another kind of paper for distribution door-to-door or in a hospital.

## 2. *Stirring up Litigation and its Consequences of Deception and Overreaching.*

There are many roots to the anti-solicitation practice. One of the ancient foundations of the matter is outlined in Vol. 4, Bk. 4, W. Blackstone, *Commentaries on the Law*

totally banned in 1959.

'One of the conclusions reached by the commissioner of patents was to the effect that advertising permits those who lack competence and integrity to generate new business that would never come to them if they had to depend on reputation alone.' (Charles A. Hobbs, Vol. 62, A.B.A. Jour. p. 737, June 1976)

"Further dangers in 'advertising' have been demonstrated. In the State of California, a member of the State Bar Disciplinary Board and a member of the State Bar Client Security Fund reports that in many cases misconduct by lawyers involved instances of soliciting employment among low and moderate income people who were ill-equipped to resist the lawyers' promises of performance. The solicitations often resulted in payments being made without any services being rendered and with some embezzlements. (Allan N. Littman, Esq. Fellow ACTL in an Address to the San Diego Bar Association on February 20, 1976)."



of England 133-37 (2d Amer. ed., Bumstead Printing Office 1799), on the sins of stirring up litigation. Barratry is "the offense of frequently exciting and stirring up suits and quarrels between his majesty's subjects." Maintenance is a "near relation" which is "an officious intermeddling in a suit that no way belongs to one, by maintaining, or assisting either party with money or otherwise, to prosecute or defend it." Champerty is a species of maintenance whereby one purchases a suit or the right of suing. While these ancient concepts have dwindled over the years, and it is not useful to bring them directly to bear in the instant situation, they evoke the fixed principle that it is socially undesirable to push people or disputes into courts.<sup>38</sup> This is precisely what appellants seek to do. By their own express statement, they acknowledge that they seek to cause divorces to be litigated which would not

<sup>38</sup> Appellants do not share this view; they believe the need to promote legal services is enough "to outweigh traditional proscriptions, upon barratry, or running and capping." (Appellants' Br., 4). The three cases cited are no help to Appellants. *NAACP v. Button*, 371 U.S. 415, 440-41, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963), expressly repeats condemnation for urging another to engage in private litigation where monetary stakes are involved. In *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 6, 84 S. Ct. 1113, 12 L. Ed. 2d 89 (1964), the Court upheld the capacity of the railroad workers "recommending competent lawyers to each other." It expressly noticed that this was "not a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice," precisely what is being done here. *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967), which holds that a union may hire a lawyer for its members, does not even touch this problem.

At root here is a conflict of values on which we stand. Appellants assert with pride that they secure divorces, get bankruptcy discharges, and bring personal injury suits where otherwise there would be no litigation, App. 89-90; the advertising provides a means to these ends. Abraham Lincoln said, "Never stir up litigation. A worse man can scarcely be found than one who does this. A moral tone ought to be infused into the profession which should drive such men out it." *Collected Works of Abraham Lincoln (Notes for Law Lecture, July 1, 1850)* (2 R. Basler ed. 1953).

otherwise be litigated or sought, and seek by virtue of their services to cause persons to become bankrupt who would not otherwise do so (T. 55). This activity is not in the true sense either maintenance or champerty, but it is pure barratry. For general review of these concepts see Radin, *Maintenance by Champerty*, 24 *Calif. L. Rev.* 48 (1935).

The inhibition on barratry carries forward as a limitation on solicitation. Professional tradition has recognized precisely the argument which is offered by these appellants and has rejected it. For illustration of the view that activities such as advertising and solicitation tend to result in stirring up litigation, see *Petition of Hubbard*, 267 S.W.2d 743 (Ky. 1954). Appellants of course conceive of themselves as stirring up "good" litigation, but there is no such limitation inherent in advertising, and the advertising does not have to be deceptive in the legal sense to be injurious; a little puffing will do. Even with vigilance, abuses creep in; appellants would drop the bars. We take illustration from neighboring California.

The soliciting attorney often puffs his own abilities. In *Geffen v. State Bar*, 14 Cal. 2d 843, 537 P.2d 1225, 122 Cal. Rptr. 865, 868 (1975), it was represented that the firm were "specialists in automobile accidents." In *Younger v. State Bar*, 12 Cal. 3d 274, 522 P.2d 5, 113 Cal. Rptr. 829, 832 (1974), an attorney represented that he and his partners had handled several of "these accident cases" and had "won them all." There have been instances of dissemination of laudatory statements such as the designation of an attorney as a specialist, *Bushman v. State Bar*, 11 Cal. 3d 558, 522 P.2d 312, 113 Cal. Rptr. 904, 909 (1974); and letters sent by an attorney's agent describing the attorney as the "King of Torts" and a "brilliant attorney," *Belli v. State Bar*, 10 Cal. 3d 824, 519 P.2d 575, 112 Cal. Rptr. 527, 536 (1974). See also *Millsberg v. State Bar*, 6 Cal. 3d 65, 490 P.2d 543, 98 Cal. Rptr. 223, 227-28 (1971), where there was dissemination of a seminar announcement describing the attorney as



a "specialist," and *Libarian v. State Bar*, 25 Cal. 2d 314, 153 P.2d 739, 740 (1944), in which an attorney solicited income tax work by postcard describing the services offered. There have been instances of an attorney showing a prospective client a check purportedly representing a settlement negotiated for another client, *Fish v. State Bar*, 214 Cal. 215, 4 P.2d 937, 940 (1931). The soliciting attorney may even guarantee success at a specific dollar figure, *Geffen v. State Bar*, *supra* at 867; in *Younger v. State Bar*, *supra* at 831, the attorney guaranteed the client \$20,000, a brand new car, and that she would not have to work another day in her life. A client facing a criminal charge was assured that he would either be freed or placed under the Youth Authority for not more than 18 months, *Best v. State Bar*, 57 Cal. 2d 633, 371 P.2d 325, 21 Cal. Rptr. 589, 591 (1962).

The pitch frequently includes deprecation of the abilities of other attorneys. In *Younger v. State Bar*, *supra* at 832, the attorney told a client he could do more good for him than another attorney. One client was told that his present attorney was not a very good one because he was not known to an employee of the soliciting attorney, who "knew all the good personal injury attorneys," *Geffen v. State Bar*, *supra*. In *Recht v. State Bar*, 218 Cal. 352, 23 P.2d 273 (1933), the attorney claimed that he and no other attorney could make recovery for the clients.

What may be the most reprehensible aspect of solicitation is the influence it has on the quality of representation the client receives and the price he pays. The attorney often becomes dependent on solicited as opposed to client-generated employment. In turn, he becomes more dependent upon the associates who feed him legal business. Frequently the agents become the employers and the attorneys merely "fronts" for

their business efforts; *Dahl v. State Bar*, 213 Cal. 160, 1 P.2d 977 (1931); *Dudney v. State Bar*, 214 Cal. 238, 4 P.2d 770 (1931). There have been several cases of insurance adjusters receiving percentages of settlements from which they paid the attorneys, *Smallberg v. State Bar*, 212 Cal. 113, 297 P. 916, 917 (1931); *Smith v. State Bar*, 211 Cal. 249, 294 P. 1057 (1930); *Townsend v. State Bar*, 210 Cal. 362, 364, 291 P. 837 (1930). The soliciting practices may be accompanied by other abuses as in *Tonini v. State Bar*, 46 Cal. 2d 491, 496, 297 P.2d 1 (1956), which involved extensive solicitations of personal injury business, coupled with falsification of a verification, various other deceptions and failure to make proper accountings to clients. In *Roth v. State Bar*, 8 Cal. 2d 656, 67 P.2d 337 (1937), the soliciting attorney did not pay the client's share of a settlement until disciplinary proceedings were commenced.

These practices, which the rules seek to control, are matters of great public concern and outrage when discovered.<sup>39</sup>

<sup>39</sup>See, e.g., Reasons & Rosenzweig, *To Mask Illegal Activities Ring Used Hospital Charity*, Los Angeles Times, Mar. 19, 1974, at 1-3; Reasons & Rosenzweig, *Promises of Windfall Settlement, Ring Preyed on Accident Victims in Barrios*, Los Angeles Times, Mar. 20, 1974, at 1; Reasons & Rosenzweig, *Profitable Sideline, Ring Wrote Medical Reports to Back Claims*, Los Angeles Times, Mar. 21, 1974, Section II at 1; Reasons & Rosenzweig, *Auto Accident Victims, Aliens Steered to Ring by Mexican Consulate*, Los Angeles Times, Mar. 22, 1974, Section II at 1.

### E. *Injury to the Public by Injury to the Profession.*

We begin with the four key elements of a profession. They are (1) a skill acquired by a particularly elaborate course of learning; (2) its clients are to a peculiar degree, more than with most other needs of life, unable to know the service they need or to evaluate the quality of that service; there is special need for earned trust and confidence; (3) the professional has a special duty to perform public service; money making, though it be indispensable, must be subordinated. Closely related (4) is a certain dignity or style—what Plato called honor—which minimizes acquisitiveness as the *raison d'être* of life; this honor leads to a duty of self-discipline, subject of course to the power of the community to control abuses. Commercialization of the profession strikes at all the elements of professionalism.<sup>40</sup> The least direct injury is to

<sup>40</sup>All this was directly before the Court in *Semler*, *supra*. The Oregon trial court opinion, see *Semler* record in this Court, T. 20-21 says:

"It is to be remembered that we are dealing here with a profession, and not a business. True, men make their living by the one as by the other, but the entirely legitimate methods by which a merchant builds up his business may be objectionable and fruitful of evil if employed by the members of a profession. . . .

"... It would be a legitimate concern of the State to make a profession as unattractive as possible for those who look upon that profession as purely a money-making pursuit, and are little mindful of the important duties, binding in conscience and rarely enforceable by coercive measures, which they assume when they are licensed by the state to practice one of the healing arts."

The Appellees' brief, at 91 in *Semler*, described the situation to which Chief Justice Hughes responded:

"The practice of employing so-called 'cappers,' 'steerers,' and 'runners,' by attorneys, physicians and dentists as a means of inducing the patronage of clients and patients has long been prohibited in almost all states by specific prohibitions in the professional practice acts under penalty of disbarment or revocation of license. These prohibitions, however, which relate to solicitation of practice through lay persons are not efficacious in preventing similar solicitation through impersonal instrumentalities, the use of which has largely replaced the old evil of the 'capper,' 'steerer,' and 'runner.' The more recent practice developed by imitation of

the educational qualifications, though students frequently undertake the long grind because of misty notions of the other three values.

### 1. *Client Dependence and the Problem of Deception.*

The subject has been adequately discussed. The plain fact is that in this field, hustle means lies, pushing people into litigation, and abuse.

### 2. *Public Service, Client Service, and the Balance with Gain.*

Advertising is the most conspicuous single badge of commercialization. Commercialize the profession, and Plato's paradox between service and money is irreparably tilted in the direction of money.

### 3. *Professional Self-Discipline.*

What we are really talking about is whether the State Supreme Court is to have the freedom to make Rules for the governance of its officers in the light of the collective wisdom of the profession. The precise substance of the rule may be less important than the process. We cannot in good faith say that the precise method of regulating solicitation adopted by the Arizona Supreme Court is the only possible

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certain types of predatory business has been largely through the use of impersonal agencies, including displays, signs and newspaper and radio advertising, coupled with the employment of advertising solicitors and free publicity press agents have also seriously affected conditions in the practice of the learned professions. There has been a serious infiltration of these practices [displays, signs, newspapers and radio advertising] into the professions, particularly into the practice of law, medicine and dentistry. Under the pressure of this infiltration the practice of the learned professions has threatened to cease to rest upon a well-merited reputation for the ability and integrity with which the lawyer, the physician and the dentist render these intimate and personal services to the sick and perplexed. In short, the learned professions have threatened not only to degenerate into a business but a 'predatory' business."



way of dealing with the subject. The House of Delegates of the American Bar Association has recently proposed certain variances.<sup>41</sup> The Supreme Court of Arizona would be free if it wished, but not required, to adopt those variations.<sup>42</sup>

Appellants pick the isolated strand of the ban on advertising, measure it against the First Amendment, equate legal counsel and professional services to the dispensing of standardized products, and the case is over for them.

But the matter is not so simple. It is a profession with which we are dealing, a profession of traditions, duties and responsibilities. In common practice, the young lawyer completes four years of college and three years of law school. He then passes a bar examination and is admitted. Between the time he graduates from law school and is admitted, his speech is restricted; that is to say, he cannot hold himself out as a lawyer nor speak as a lawyer would. He may have passed his examination and the actual taking of the oath may be only a delayed matter of form, but in the meantime he is not free to speak as a lawyer.

He is then admitted to the bar and becomes an officer of the court. He undertakes to honor and abide by the ethical standards of the profession. In so doing he not only gives up the right to advertise but also accepts any number of other

<sup>41</sup>The amendment of February 17, 1976, permits listing in appropriate directories and the classified telephone pages of office hours, credit information, and the availability of fee information upon request. The big change is the addition of the yellow pages to the law lists and directories as a depository of this information (App. 446).

<sup>42</sup>Something is made of the distinction between a legislative rule and the professional recommendation on the same subject in *Health Systems Agency of Northern Virginia v. Virginia State Board of Medicine*, E.D. Va., Alex. Div. Civ. No. 76-37-A, which, in invalidating a prohibition on medical advertising in reputable medical directories, notes that the Judicial Council of the American Medical Association had approved of the type of statements in issue. In the instant case, the advertisement is not remotely within the scope of the recent suggestions of the House of Delegates.

restrictions upon his freedom of speech. For example, he may not further the application for admission to the bar of someone "unqualified in respect to character, education, or other relevant attribute," DR 1-101 (B). Unless the knowledge is privileged, he is given a positive duty to speak concerning misconduct of lawyers or judges in a manner which could be compelled for the rest of the citizenry only by subpoena. His speech is restricted in the advice he may give his clients—"the attorney should not advise or sanction acts by his client which he himself should not do." Op. 75. He is barred not merely from advertising in newspapers but from having himself generally puffed by payment to media representatives, DR 2-101, a privilege which non-professionals may freely enjoy. There are limitations on what the lawyer may say about himself as a specialist or as limiting his practice, DR 2-105. He is not allowed to make arguments, which is to say to speak or to print, to advance positions unwarranted under existing law unless such arguments can be made in good faith, DR 2-109; in short he may not speak for purposes of delay.

Particularly restrictive of speech is the Rule under which a lawyer must preserve the confidences and secrets of a client.<sup>43</sup> Under Canon 5 a lawyer may not speak unless he is exercising independent professional judgment on behalf of a client. There are also sharp economic limitations upon his capacity to speak from the witness stand; with qualifications immaterial here he cannot accept representation at all if testimony will be expected of him. The duty to represent a client zealously within the bounds of the law (Canon 7) puts all sorts of limitations on what a lawyer can say; almost every subdivision of the rule is some kind of speech control.

<sup>43</sup>The protection of confidences is perhaps the oldest professional restriction on speech. The Oath of Hippocrates concludes, "Whatever things I see or hear concerning the life of man in my attendance on the sick or even apart therefrom, which ought not to be noised abroad, I will keep silence thereon, counting those things to be as sacred secrets." 11 *Encyc. Brit.* 827.



Where a layman might engage in undignified or discourteous conduct, which would include speech, a lawyer may not, and DR 7-107 puts comprehensive limitations on what the lawyer may say concerning his own case. DR 8-102 sharply limits what a lawyer may say about the qualifications of a candidate for judicial office, limitations which would not apply to the general public. A layman may state that he has improper influence with a legislative body or a public official, and so long as he does not accept or give bribes, he violates no legal restriction. Under DR 9-101 (c) a lawyer could be disbarred for the same statement.

There are additional limitations, but these will make the point. When a lawyer becomes an officer of the court, when he is admitted to the profession, he obtains numerous privileges and accepts numerous duties. He also accepts as part of his professional status a whole series of restrictions upon his self-expression, restrictions which do not apply to the rest of the public. The restrictions on advertising are but a part, a sort of specialized application, of an overall pattern of restrictions on communication which in turn are part of the profession of being a lawyer.<sup>44</sup>

The matter before the Court therefore is only incidentally the restrictions on solicitation and advertising. The larger matter is whether the Constitution of the United States

<sup>44</sup>"A. V. Dicey took the point in 1867. 'The chief difference between a profession and a trade or business', he said, 'is, that in the case of a profession its members sacrifice a certain amount of individual liberty in order to ensure certain professional objects. In a trade or business the conduct of each individual is avowedly regulated simply by the general rules of honesty and regard to his own interest.' This was a charitable view of much of the business practice of his day. Honesty often weighed rather lightly in the scale against self-interest, not in acknowledged 'trade' only but also in aspiring professions, and the early campaigners for professional ethics were performing a genuine public service at the same time as they endeavoured to raise their own standing." *W. Reader, Professional Men: The Rise of the Professional Classes in Nineteenth Century England* 159 (1966).

deprives one of the most traditional of true professions of a certain right of self-government subject to the control and direction of the State Supreme Courts under whom the members of that profession dominantly serve.

#### 4. *Advertising is Destructive of Professional Pride and Dignity.*

We ask the Court to take judicial notice of what every member of it has experienced, that a good lawyer takes pride in his profession. That pride is part of what makes him a lawyer. It is a part of the pull to the better side of his nature, the pull which causes him to honor his ethical obligations to seek to serve. This is another way of speaking of a certain professional dignity. The wrongest single sentence in appellants' brief is the line (p. 49), "A desire to uphold the dignity of the profession is not primarily a public concern." That pride and dignity are an important part of the fabric separating the twentieth century lawyer from the clawing pack of the nineteenth.

A portion of this pride is born of the traditions of the profession. A portion of it comes from the realization and exercise of skills hard-acquired. A portion of that pride, with all deference to our commercial clients, is because we are not a part of commerce. What we mean may be mystical, but it is a mystique which every member of this Court knows full well; it is that we are professionals. We all know, or overoptimistically think we do, that life could be more lucrative if we shifted to the world of capital gains or were involved in the distribution of goods instead of services; we take a certain portion of our pay in pride, or what Plato referred to as pay in honor.

A most conspicuous badge of that professionalism is the prohibition on soliciting business. As Mr. Robert Begam, President of the 25,000 member Association of Trial Lawyers of America, put it:

"First, a matter, I guess, of dignity, not in any great abstract sense, but I have the feeling that the dignity of a learned profession is seriously compromised by shopkeeper advertising. We have traditionally obtained clients through executing well our professional duties on behalf of our clients, through development of reputation among our peers and in our community, not only through service to our clients, but through service to the public and to the community and to our country. That complex of traditions leads to our right to call ourselves a learned, independent and dignified profession. Dignified in that sense.

"I have a feeling that those values are compromised by commercial advertising." (App. 287-88).

A real part of that pride derives from the absence of advertising,<sup>45</sup> and the cases so hold. All of these objections are facets of a central theme, that advertising is repugnant to the dignity of the profession. As put in one of the earliest cases, *People v. MacCabe*, 18 Colo. 186, 32 P. 280 (1893):

"The ethics of the legal profession forbid that an attorney should advertise his talents or his skill, as a shopkeeper advertises his wares. . . ." 32 P. at 280.

<sup>45</sup>See the statement of Mr. Lyman Davidson, a distinguished accountant, App. 44:

"Well, I think anytime you advertise you imply that some kind of a profit motive—that your first obligation is not to the public, it is to yourself, to make a profit. That is my feeling, and the way it would be taken.

"I think the public, over this period of 70 years has been educated to the fact that accountants do not solicit or advertise, and it would be degrading to the profession and not in the best interest of the public if they did."

Appellants' argument that Bar institutional advertising of lawyer referral services for the poor somehow helps their cause (Appellants' Br. 37) misses the mark. The distinction is between individual advertising for purposes of individual gain, and advertising with no shred of personal benefit in it; the distinction of the gain and non-gain elements in relation to the Canons is fully recognized in *NAACP v. Button*, 371 U.S. 415, 443, 444, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963).

The leading disbarment for advertising case usually cited both for its majority and its dissent (which went off on grounds not material here) is *In re Schwarz*, 195 App. Div. 194, 186 N.Y.S. 535, *aff'd*, 231 N.Y. 642, 132 N.E. 921 (1921). Finding that the advertisement was "typical of modern advertising business methods" and "abhorrent to professional standards," the Appellate Term Opinion, adopted per curiam in the Court of Appeals, said:

". . . It is evident that the respondent has no conception of the ethics of the profession, and is obsessed by the notion that self-advertisement is a proper means of obtaining professional employment. . . ." 186 N.Y.S. at 538.

The dissenting opinion of Judge Pound, joined by Judge Cardozo, in the Court of Appeals, said:

"The profession has ever discountenanced as undignified and indecorous the conduct of the lawyer who blatantly advertises for business as those engaged in trade may do without exciting unfavorable criticism. Attorneys are officers belonging to the courts and subject to their control and discipline. . . . Advertising or soliciting business is censurable as a form of self-laudation unbecoming the traditions of a high calling. The canon thus incorporates in the Code of Ethics an ideal standard of conduct which has been long and well recognized and upheld in theory both by bench and bar. The attorney who disregards the rule is properly subject to rebuke if not to disbarment. . . ." 132 N.E. at 922.

See also *In re Cohen*, 261 Mass. 484, 159 N.E. 495, 496 (1928):

". . . Codes of legal ethics adopted by bar associations of course have no statutory force. They are illuminating as showing views entertained by organizations of members of the bar concerning the tests of proper conduct for those charged with the important functions of attorneys admitted to practice within the courts. They are commonly recognized by bench and bar



alike as establishing wholesome standards of professional action. It has long been a part of the ethics of lawyers that the solicitation of clientage by advertisements such as that here disclosed is contrary to sound practice. That has been the consensus of opinion manifested both by writers on legal ethics and by the standard maintained by the great mass of the profession.

For other cases to the same general effect, see *In re Oliensis*, 26 Pa. Dist. 853 (1917); *In re Greathouse*, 189 Minn. 51, 248 N.W. 735 (1933); *Ingersoll v. Coal Creek Coal Co.*, 117 Tenn. 263, 98 S.W. 178 (1906); *In re Duffy*, 19 App. Div. 2d 117, 242 N.Y.S.2d 665 (1963); *State v. Crocker*, 132 Neb. 214, 271 N.W. 444 (1937); *People v. Berezniak*, 292 Ill. 305, 127 N.E. 36 (1920); *Mayer v. State Bar of California*, 2 Cal. 2d 71, 39 P.2d 206 (1934). The latter case says:

"... If the respect of the people in the honor and integrity of the legal profession is to be retained, both lawyers and laymen must recognize and realize the fact that the legal profession is a profession and not a trade, and that the basic ideal of that profession is to render service and secure justice for those seeking its aid. It is not a business, using bargain counter methods to reap large profits for those who conduct it. The blatant methods and the offensive type of advertising used by petitioner are utterly intolerable. Such methods cast discredit, not only upon the petitioner himself, but upon every member of the legal profession. Such advertising is not only contrary to the ethics of the profession, but is repugnant to all canons of good taste, and is made a crime by the statutes of this state." 39 P.2d at 208.

The court decisions are paralleled by ethics determinations of Bar Associations all over the country. *O. Maru, Digest of Bar Association Ethics Opinions* (1970), has some 4,786 opinions dealing with some 6,631 points of ethical concern. Almost twenty-five percent of those opinions and points deal with advertising and solicitation. There was in

fact some advertising by lawyers in the United States in the nineteenth century; *Sharswood's Professional Ethics*, published in 1854, says nothing about advertising, and the earliest Code of Ethics of an American bar association, that of Alabama in 1887, approved of some forms of advertising. However, after 1908, the practice stabilized as reflected in the Canon 27 adopted at that time that "solicitation of business by circulars or advertisements . . . is unprofessional." The first of the many advisory formal opinions of the A.B.A. in 1924 stated:

"Any conduct that tends to commercialize or bring 'bargain counter' methods into the practice of the law, lowers the profession in public confidence and lessens its ability to render efficiently that high character of service to which the members of the profession are called." *ABA Comm. on Professional Ethics, Opinions*, No. 1 at 58 (1924).

The many subsequent advisory opinions include: Formal Opinion No. 4 (1924), *id.* at 60, bars advertising regardless of local custom; Formal Opinion No. 13, *id.* (1928) at 85, rejects the notion that there somehow is a "need to know" which warrants advertising; Formal Opinion No. 42, *id.* (1931) at 129, notes that advertising is not made better because a court acquiesces in it; Formal Opinion No. 73, *id.* (1932) at 174, has an extensive discussion of the impropriety of advertising for divorce business, precisely what has been done here. Formal Opinion No. 184, *id.* (1938) at 366, decries as "highly reprehensible" self-laudation by way of advertising, as bound to be misleading.

In Arizona the opinions have been the same. Opinion No. 3 (1954), 9 *Ariz. B. J.*, No. 3 at 9 (1973-74) notes that printing of a professional card in a local newspaper would "offend the traditions and lower the tone of our profession and is reprehensible." Opinion No. 48 (1959), *id.* at 13, disapproved of puffing listings in an automobile service manual.



The law is a profession and, to borrow a phrase from a great lawyer, there are those who love it.

### 5. *Apologia.*

The thrust may be made that we write of a dream world, that lawyers have not performed with honor, with charity, with service, that whatever right we may have had in the past to regard ourselves as a profession, we have somehow lost it in failure to serve the needs of the community.

We repeat the charge at its cruelest because this is the moment of truth, and there is some merit in it. The better elements of the profession are neither smug nor complacent. We could do better, and for our failures there is every reason to recite the *mea culpa*. Yet we again ask the Court to take judicial notice that the long haul spiral is upward, that the efforts to achieve professional goals are enormous, that while there are failures to meet the aspirations of, for example, Canon 8 and the rest, there are also successes. The good in terms of sacrifice and service far outweighs the bad. If appellants succeed in turning law into a straight commercial venture, like selling shoes or aspirin, the first loser will be the public service function of the Bar, for which commerce has no parallel.

### F. *The Need for Legal Service at Affordable Fees.*

The lament of the consumer group and the under-represented is twice sad; first, because it is justified and second, because it is misdirected. The essential justification offered by appellants for advertising is that legal services are needed by the poor, and that advertising is the way to supply them at low cost, that economies of scale can be secured in no other way (Appellants' Br. 33).

Nobody doubts the first half of this proposition, which is why the Bar is making major efforts to help; see the testimony of Arizona Bar President Mark Harrison, a brilliant exemplar of action to this end (Harrison dep. App. 374-75).

The issue is whether advertising will serve this end without intolerable social loss. The answer is No.

First, there is no evidence offered and no reason to suppose that lawyer advertising would be used generally for this benign purpose. What is considerably more probable quantitatively is advertising of the "Let us beat your raps" or "Five verdicts of more than \$100,000 last year" variety; see the cluster of unappetizing California cases cited, *supra*.

The sole evidence on the economy of scale hypothesis is a statement by one of the appellants (App. 122-25). He is a young man, but briefly out of law school, and however earnest, has no qualifications as an expert on service marketing.<sup>46</sup> As was noted earlier, the methods and devices so proudly proclaimed by appellants are equivalent to the re-invention of the wheel; the use of efficient equipment, paralegals, and so on, is old stuff.

So far as the price effect is concerned, the record is barren and the Court can use only its informed judgment. Appellants' only expert witness testified as to the effect of advertising on standard products, not services (App. 172, *et seq.*), and expressly disclaimed the capacity to make empirical studies where what was advertised could not be standardized (App. 209-10). As for the amount of price effect, the two studies offered showed a price differential in favor of advertised products of 5% on drugs (App. 178) and a five or six dollar differential on a \$30 to \$40 pair of eye-

<sup>46</sup>"What you are saying, the systems approach, as you have described, is not economically viable unless it can rely upon substantial volume; is that true?"

"A. By Mr. O'Steen: Precisely.

"Q. Do you think that you could accomplish the same objective [creating a better system of delivery of legal services for those not receiving them] without quoting prices for services in the advertisement?"

"A. By Mr. O'Steen: No. . . ." (App. 122-23).

glasses (App. 183). Putting aside all question of desirability for other reasons, there is not a whiff of factual evidence in this record as to whether advertising would (a) depress the cost of legal services (b) in a degree significant enough to do the poor the slightest good.

On the other hand, the tradeoffs are terrible. If lawyer advertising in the drift of time converted the profession into a commercial operation, those not able to afford services would be the losers. Convert the law into just another retail operation, and the public service goes with it. We trust we have not minimized the contributions to charity of countless commercial enterprises; the factories doubtless give more to the Community Chest than the Bar. The profession, for the very reason that it is not commercial, is giving of itself, its services.

For a good presentation that "The rules against advertising and solicitation serve chiefly to protect clients of low or moderate income rather than commercial clients familiar with legal problems and lawyers," see Comment, *Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys*, 62 *Calif. L. Rev.* 1135, 1150 (1976); and see the observation of Chief Justice Traynor in *Hildebrand*, *supra*, that it is persons in the category of appellants' hoped-for clients who will be the biggest losers by these practices. It is not the rich who are abused by solicitation in violation of the existing Canons; it is the low-income, occasional user of legal services.

#### G. Conclusion.

On balance, the rules should be sustained.

By its course of decision, the Court has assigned itself the duty of balancing the good to be achieved by the advertisement of legal services as against the evil, to the end of determining whether, under the First Amendment, this

communication may be restricted.<sup>47</sup> As will be more fully developed in the antitrust portion of this argument, this record clearly shows that advertising is in no way essential in Arizona to permit young people to enter the profession of law, or for that matter accounting or medicine or architecture, and quickly develop their practices; in Arizona this has been happening for years. Appellants present themselves in a cloak of nobility and high purpose. The fact is that we are talking about very ugly business. Appellants acknowledge that if they have a right to publish this ad, then they also have a right to solicit the injured at the scene of the accident or to distribute leaflets in the hospital.<sup>48</sup> The damage to the public as well as to the profession by depriving it of the key elements which make it a profession outweighs the good of solicitation.

We have said earlier that it is not so much the details of the particular Rule which are involved as the procedure for establishing it. The Rule is not sacrosanct; as noted, the

<sup>47</sup>If the so-called "absolute" view of the mandate of the First Amendment were taken that there may be "no law of any kind abridging the freedom of speech or of the press," we would contend that this is neither the "abridgment" nor the "speech" contemplated by the Amendment.

<sup>48</sup>This is not fanciful. For examples, see *Younger v. State Bar*, 12 Cal. 3d 274, 522 P.2d 5, 113 Cal. Rptr. 829 (1974) (the attorney or his capper frequently solicited in the hospital at which prospective clients were being treated. In one count, the solicitation occurred a day after a serious injury where patient's eye was swollen shut so as not able to read retainer agreement; in another count, solicitation occurred three days after injury while the prospective client was "in a lot of pain"); *Honoroff v. State Bar*, 50 Cal. 2d 202, 204-07, 323 P.2d 1003 (1958) (a Los Angeles attorney and his associate traveled to Illinois to solicit clients taken from a "serious condition" list of a train accident); *Tonini v. State Bar*, 46 Cal. 2d 491, 492-95, 297 P.2d 1 (1956) (solicitations by attorneys and their agents within one day of serious injuries); *Roth v. State Bar*, 8 Cal. 2d 656, 657-58, 67 P.2d 337 (1937) (two clients solicited at a hospital); *Fish v. State Bar*, 214 Cal. 215, 218, 220, 4 P.2d 937 (1931) (solicitation by associate within one day of serious burns; in another count solicitation occurred in the hospital by the attorney); also see *McCue v. State Bar*, 4 Cal. 2d 79, 80, 47 P.2d 268 (1935).



House of Delegates has recommended certain minor modifications, none of which, however, would permit advertisement such as that here in issue. If appellants prevail, this Court discards the systems of professional analysis, experience and recommendation to the state authorities. This professional responsibility is at the heart of the concept of professionalism.

Apart from the many other considerations involved, the public gets more good from letting the law be a profession than it will get from upsetting the Platonic balance and sanctifying the commercial at the expense of ethical reserve. The case must be decided in the light of the standard unanimously expressed for the Court by Justice Douglas in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491, 75 S. Ct. 461, 99 L. Ed. 563 (1955): it is constitutionally legitimate to "attempt to free the profession, to as great an extent as possible, from all taints of commercialism."

## II. *The Advertising Restrictions do not Violate the Sherman Act.*

No one could contend that the professions are exempt from the Sherman Act. *Goldfarb v. Virginia State Bar*, *supra*. The activities of appellants so far as commerce is concerned are marginal at best because of their nature, but the rule under challenge is statewide and is imposed by the Arizona Supreme Court on all lawyers handling all business. No issue was made of the commerce point below nor do we here, because the antitrust laws are, independently, inapplicable.

### A. *The Antitrust Assertion is Barred by the Rule of Parker v. Brown.*

Assuming that there were, otherwise, an unreasonable restraint of trade in restrictions of advertising, the challenge cannot be made in circumstances where the particular restriction is imposed directly by the state itself. *Parker v.*

*Brown*, *supra*, expressly holds that where activity which might otherwise be regarded as a violation of the antitrust laws is either undertaken or required by the state, the antitrust laws are inapplicable:

"... We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . . [I]n view of the [Act's] words and history, it must be taken to be a prohibition of individual and not state action. . . . The state . . . imposed the restraints as an act of government which the Sherman Act did not undertake to prohibit. . . ." 317 U.S. 350-51, 52.

This issue was fully presented in *Goldfarb*, *supra*. In that case the question was whether a minimum fee schedule for a County Bar Association violated the antitrust laws. The Supreme Court held that there was no state requirement of the fee schedule in any way—this was simply an activity of the County Bar Association. It therefore held that to be within the *Parker v. Brown* exemption, "It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." 95 S. Ct. at 2015.

In the instant case, the conduct is more than expressly required by the Supreme Court by its official action; it is the Supreme Court Rule which is here being enforced, by the Supreme Court itself.<sup>49</sup>

<sup>49</sup>For some of the countless cases holding particular restrictions not subject to the antitrust laws because of state action, see *State of New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974) (state as purchaser); *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966) (port authority); *S & S Logging Co. v. Barker*, 366 F.2d 617 (9th Cir. 1966) (government employees); *Alabama Power Co. v. Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir. 1968) (REA loan); *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969) (exclusive franchise for garbage collection); *Gas Light Co. of Columbus v. Georgia*



Nothing in *Cantor v. Detroit Edison Co.*, *supra*, is to the contrary. We abstain from close analysis of the several opinions in *Cantor* because *Cantor* fully recognizes and does not vary the rule it accepts from *Parker* that "action taken by state officials pursuant to express legislative command did not violate the Sherman Act." The instant case does not deal in any way with the subject of *Cantor*, "private conduct required by State Law." In this case direct state action has been taken by the State Supreme Court, after hearing by persons who for this purpose are functioning as officials for the courts, but on the independent judgment of the Court itself. The Supreme Court is enforcing a rule issued by it under express legislative authorization. *Cantor*, dealing with private action taken under state sanction, is simply irrelevant. It is true that the Canons as proposed to the State Supreme Court come from the Bar but it is not the law that any private role in procuring a state rule of law will preclude immunity. Such a rule would effectively emasculate the closely related "lobbying" exemption created by the *Noerr-Pennington doctrine*,<sup>50</sup> by causing it to evaporate if lobbying is successful. The exemption exists if the State, after a meaningful opportunity for independent consideration of the restrictive requirement, adopted it as its own. Cf. *Wood's Exploration & Production Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971); *Gas Light Co.*

*Power Co.*, 440 F.2d 1135 (5th Cir. 1971) (electric rates); *Howard v. State Department of Highways of Colorado*, 478 F.2d 581 (10th Cir. 1973) (state authorized monopolization of camp ground and recreational facilities); *Saenz v. University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973) (organization controlled by state university); *Padgett v. Louisville & Jefferson County Air Board*, 492 F.2d 1258 (6th Cir. 1974) (exclusive contract to taxicab company at airport).

<sup>50</sup>So named from the two leading Supreme Court decisions announcing it: *Eastern Railroad Conference v. Noerr Motor Freight*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965).

*of Columbus v. Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 30 (1st Cir. 1970); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1134 (5th Cir. 1973).

As has been noted, if it matters, the adoption of the Code of Professional Responsibility by the Supreme Court was neither a rubber stamp function nor routine acquiescence in a private proposal. The Rule involved is adopted under Rule 29(A) of the Rules of the Supreme Court which adopted the ABA Code "as amended by this Court," betokening the careful scrutiny it obtained. Because we think *Cantor* inapplicable to direct state action, as distinguished from private action, we think it unnecessary to speak at length to the qualification in the plurality opinion that an exemption applies where it is necessary "to make the regulatory act work . . ."<sup>51</sup> We do note, however, that the object of the Canons, among others, is to maintain professional integrity. We have argued

<sup>51</sup>Justice Stevens in *Cantor* says:

"[T]he standards for ascertaining the existence and scope of such an exemption surely must be at least as severe as those applied to federal regulatory legislation." 96 S. Ct. at 3120.

The standards for the federal regulatory exemption include (1) a pervasive general regulatory scheme that makes part of the scheme the specific anti-competitive conduct involved. This would mean either a specific statute as part of that scheme prohibiting the competitive conduct or a rule with direct guidelines; (2) there must be substantial government involvement in the anti-competitive project. This means that the government is not merely rubber-stamping the acts of private parties, but that the anti-competitive conduct is subject to regulation, supervision and approval by a government body, preferably following public hearing; and (3) the failure to follow this anti-competitive course would substantially undermine the total regulatory scheme. See *Gordon v. New York Stock Exchange, Inc.*, 95 S. Ct. 2598 (1975); *United States v. National Association of Securities Dealers, Inc.*, 95 S. Ct. 2427 (1975); *Ottetail Power Co. v. United States*, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973); *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963). All exist here.

at length that this restriction is necessary to assure professional integrity. The power of the State to deal with "prevention of practices in a profession which will tend to demoralize the profession" was upheld in *Semler, supra*, and it is that with which we deal here.

B. *The Restriction, in any Case, is not an Unreasonable Restraint of Trade.*

While *Parker v. Brown* ends the discussion as to the application of the Sherman Act to this direct state action, we are of course aware that the country's professions are watching this case with intent interest. As this record shows, in Arizona, advertising is categorically prohibited by state law for law, medicine, and accountancy, while for architecture the only sanction is professional association action. We appreciate that there are too many professions with their own individual traditions and practices to permit a generalization,<sup>52</sup> but assuming traditions similar to the law, professional restraints on solicitation or advertising may well be reasonable for much the same reasons as those advanced in the free speech portion of this Argument.

This record is overwhelming that solicitation or, more narrowly, advertising restrictions in no way limit the access of young professionals to the field. There are 4,000 active lawyers in Arizona, none of whom has ever advertised, and all competent young persons are advancing suitably; Harrison, App. 373; Begam, App. 294-95. Able beginners in accounting (Davidson, App. 40-41) medicine (Helme, 318-19), and architecture (Arnold, App. 151) rapidly establish themselves in Arizona. Advertising restrictions have not limited law firm growth. Exhibit 2 shows a pattern of prodigious expansion, and all without advertising.

<sup>52</sup>Thus accountants, for example, have a special duty to give independent opinions which would be compromised by soliciting business; see discussion by Lyman Davidson at App. 43.

## CONCLUSION

We appreciate that the profession has not always had the respect of the community; it was an uphill fight in the nineteenth century to establish lawyers as anything but a public affliction. Yet progress has been made, and in real part by virtue of the Canons of Ethics.

For most lawyers, the sense of professionalism and the decent dignity which goes with it is one of the great rewards of life. We write in the water of contemporary controversy and we earn livelihoods which, principally by virtue of the personal gains taxation system, are not with us long. Basically, we pass on not things but traditions.

We do not here bespeak tradition for its own sake. We recognize that trappings pass, and indeed they should; it was no loss for the lawyer to take off the wig and the robe and assume the business suit. But some elements of professionalism, of tradition, and of dignity are genuinely vital; the profession is entitled to make its own judgments, to preserve them or, perhaps, to modify and alter them as experience teaches new wisdom. Advertising will serve no social purpose or legitimate legal end; much which is valuable will be lost if we are to fill the press or the third-class mail with the word that wills may be obtained for \$19.95, with special sales in July.

The decision of the Supreme Court of Arizona should be affirmed.

Respectfully submitted,  
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December, 1976.

<sup>53</sup>We appreciatively acknowledge the aid and counsel in the preparation of this brief of Mr. Andrew Gordon and Mr. Charles G. Case II and of our legal assistant, Ms. Suzanne Lee of Lewis and Roca; Mr. Daniel J. McAuliffe of Snell & Wilmer; Mr. Neil V. Wake of Jennings, Strouss and Salmon; and Mr. Victor W. Riches of Robbins, Green, O'Grady & Abbuhl, all of Phoenix, Arizona.

APPENDIX

ADVERTISEMENT

# ***DO YOU NEED A LAWYER?***

**LEGAL SERVICES  
AT VERY REASONABLE FEES**



- Divorce or legal separation--uncontested  
[both spouses sign papers]

\$175.00 plus \$20.00 court filing fee

- Preparation of all court papers and instructions on how to do your own simple uncontested divorce

\$100.00

- Adoption--uncontested severance proceeding

\$225.00 plus approximately \$10.00 publication cost

- Bankruptcy--non-business, no contested proceedings

Individual

\$250.00 plus \$55.00 court filing fee

Wife and Husband

\$300.00 plus \$110.00 court filing fee

- Change of Name

\$95.00 plus \$20.00 court filing fee

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**Legal Clinic of Bates & O'Steen**

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Phoenix, Arizona 85004

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

No. 76-316

JOHN R. BATES and VAN O'STEEN,

*Appellants,*

—v.—

STATE BAR OF ARIZONA,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

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REPLY BRIEF FOR THE APPELLANTS

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ARGUMENT

Appellee's brief exudes a sincere respect for the legal profession which appellants share. It is by no means true, however, and it most certainly has

not been demonstrated, that the existence of advertising will lead to a loss of the service-orientation of the profession or will interfere with other public values of professionalism. Providing the public with easy access to needed information regarding the availability and cost of legal services is in the best tradition of the profession. Subsequent decisions accord with the view set forth in appellants' brief that the public interest is better served by broad dissemination of information about individual practitioners than by the suppression of it.

On December 15, 1976, a three-judge federal court decided Consumers Union of United States, Inc. v. American Bar Association, Civ. Act. No. 75-0105-R, BNA Antitrust & Trade Reg. Rptr., No. 795 (E.D. Va.). That case arose from an attempt by Consumers Union to produce a directory of legal services containing information elicited from individual attorneys, including their office location, education, areas of specialization, fees and billing practices. The furnishing of such information by attorneys was

prohibited by Disciplinary Rules 2-101 and 2-102, originated by the American Bar Association and adopted by the Supreme Court of Virginia.<sup>1</sup> A majority of the court held that the prohibition against publication of non-fee information or information regarding fees for initial consultation violated the First Amendment.

On the question of the publication of fees for specific legal services, the court split.<sup>2</sup> Judge Merhige ruled that for at least some services, publication of fees would be protected:

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<sup>1</sup>The Supreme Court of Virginia had rejected recent amendments adopted by the American Bar Association which permit certain types of advertising in telephone directories or directories published by bar associations. See Appellants Brief, p. 14, n. 3. The rules in effect in Virginia were accordingly identical in their operative effect to the Arizona rules involved in the present case.

<sup>2</sup>Circuit Judge Bryan dissented on the ground that the suit should be dismissed from federal court on grounds of comity; he accordingly did not reach the merits at all.

There are...legal services that are, in the author's view, sufficiently standardized to permit accurate characterizations in a directory. An initial consultation, an ordinary residential real estate conveyance, an uncontested divorce, a standard lease and a change of name proceedings, are examples which quickly come to mind, and all of the problems presented therein can be handled by an attorney in committing an amount of time and expertise that is not greatly variable from case to case. If the service itself is adequately specified, and standardized, a fee statement is not misleading.

(Slip. Op. p. 30; footnotes omitted).

Judge Warriner dissented on this point, contending that specific services varied so much that publication of a fee was misleading.

Appellants, of course, concur in the position of Judge Merhige that the advertisement of fees for standardized services is constitutionally protected. In addition, even if varying amounts of time and expertise are required for the performance of a particular service,

publication of a set fee is not misleading if the service is competently performed for the advertised fee. See Appellants' Brief, pp. 17-18, 43-44. And fee information is particularly entitled to constitutional protection. Id. at pp. 31-34; cf. United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971). But in any event, the decision in Consumers Union provides support for striking down Disciplinary Rule 2-101(B) as overbroad, for the rule prohibits publication of non-fee information that both judges in the majority agree is protected by the First Amendment.<sup>3</sup>

An even stronger conclusion was reached unanimously by a three-judge court in Health Systems Agency of Northern Virginia, Inc. v. Virginia State Board of Medicine, Civ. Act. No. 76-37-A, BNA Antitrust & Trade Reg. Rptr. No. 789, p. D-1 (E.D. Va.; Nov. 9, 1976). There the court held that physicians were protected by the First Amendment from being disciplined for furnishing information for a consumers' medical services

<sup>3</sup> See also Population Services International v. Wilson, 398 F. Supp. 321 (S.D.N.Y. 1975), prob. jur. noted, 96 S. Ct. 2621 (1976).



directory that set forth individual physicians' fees for routine office and hospital visits and for certain laboratory tests, along with information regarding office hours, billing practices and other matters.<sup>4</sup> The court ruled that the constitutional interest in free dissemination of information as exercised in publication of the directory outweighed the asserted state needs to prevent fraudulent or deceptive practices and to prevent unwitting misuse by the public of truthful information.

The balance struck by these decisions casts grave doubt upon appellee's assumptions that advertising will cause the virtual destruction of the legal profession. So does the recent action of the District of Columbia Bar Association in proposing amendments to the Code of Professional Responsibility which would permit advertisement of fee information

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<sup>4</sup> The statute of which enforcement was enjoined by the court, Virginia Code § 54-317, forbade physicians to advertise "...professional services, their costs, prices, fees, credit terms or quality."

by individual attorneys.<sup>5</sup> (Amicus Brief of United States, App. p. 20a). Similarly, the suggestion in appellee's brief (pp. 45-46) and that of the American Bar Association (pp. 29-30) that the states should be free to experiment with varying degrees and types of restrictions tends to refute the contention that an overwhelming public interest requires the suppression of all public commercial speech by individual attorneys.

The remaining contentions of appellee are adequately met in appellants' original brief, and that ground will not be re-covered here. At one point, however, appellee's brief (p. 37) states that the divorce price of \$175 advertised by appellants is in some cases excessive. This conclusion is based solely on the

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<sup>5</sup> The proposed District of Columbia amendments would prohibit varieties of false or deceptive advertisement, which are not protected. See Young v. American Mini Theatres, Inc., 96 S. Ct. 2440, 2451 (1976). Counsel for appellee has asked us to note that he will refer to Young, which was not cited in his brief, in oral argument.

statement of Justice Gordon of the Supreme Court of Arizona, concurring, that he is "able to foresee instances in which the \$175.00 fee quoted for this service would be unreasonably high." (Jur. St. App. p. 12a). This observation was not offered as a finding, nor could it have been, for there is absolutely nothing in the record to suggest that appellants' fees were in fact too high for any service rendered. Appellants doubt that uncontested divorces can economically be offered in their community for less than \$175, but if some attorney is able to organize his practice in such a way as to provide competent divorce services for \$150, then let him advertise that fact and the public will benefit even more than they do from appellants' services. That point is the crux of this case, with regard to both the First Amendment and the anti-trust laws.

A final word must be addressed to the position of the United States in regard to the applicability of the Parker v. Brown "state action exemption" from the antitrust laws. While not disputing the private origination of Disciplinary

Rule 2-101(B), the Government has concluded that adoption and enforcement of the Rule by the Arizona Supreme Court places it beyond the scope of the anti-trust laws. (Brief of United States, pp. 15-21). The difficulty with this position is that it requires one to ignore much of what this Court said and did in Cantor v. Detroit Edison Co., 96 S. Ct. 3110 (1976). In rejecting the argument that the antitrust laws ought not to apply to industries pervasively regulated by the states, this Court said that "even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's...." 96 S. Ct. at 3119. The Court went on to state:

...[A]ssuming that there are situations in which the existence of state regulation should give rise to an implied exemption, the standards for ascertaining the existence and scope of such an exemption surely must be at least as severe as those applied to federal regulatory legislation.

The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining

that exemption was necessary in order to make the regulatory act work, "and even then only to the minimum extent necessary."

Id. at 3120 (footnote omitted). The Court concluded that even if the anti-trust laws outlawed Detroit Edison's light bulb exchange program, "there is no reason to believe that Michigan's regulation of its electric utilities will no longer be able to function effectively." Id. This conclusion did not turn on any distinction between legislative and administrative state action.

The Government's approach dispenses with the need for all this examination of the character of the restraint and its importance to the state regulatory scheme; it is enough if the state promulgates and enforces the restriction. (Brief of the United States, pp. 15-21). Nor is there any room for consideration of the degree to which the restraint frustrates federal antitrust policy. The question is settled for the Government when it determines that the state really intended to give effect to the restraint. As a result, the states are

given much wider latitude in creating implied exemptions to the antitrust laws than is Congress. This is not the rule of Cantor, but the Government has apparently not acquiesced in Cantor.

Appellants suggest that Cantor does control, and that by its tests Disciplinary Rule 2-101(B) cannot stand. The prohibition of advertising is not essential to the Arizona Supreme Court's regulation of the practice of law, and it frustrates the competitive goals of the antitrust laws without substituting any compensating rate regulation. The state is not entitled to compel private conduct in violation of the antitrust laws. Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384 (1951). Disciplinary Rule 2-101(B) consequently conflicts with the Sherman Act.

#### CONCLUSION

For these and the other reasons set forth in appellants' original brief, the decision of the Supreme Court of Arizona should be reversed.



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IN THE  
**Supreme Court of the United States**

October Term, 1976  
No. 76-316

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of November, A.D. 1976.

JOHN R. BATES and VAN O'STEEN,  
*Appellants,*  
vs.  
STATE BAR OF ARIZONA,  
*Appellee.*

On Appeal From the Supreme Court of the  
State of Arizona.

**Brief of Amici Curiae the Mountain Plains Congress  
of Senior Organizations, the National Association  
of State Units on Aging, the California State Office  
on Aging and the Gray Panthers.**

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**Brief of Amici Curiae the Mountain Plains Congress  
of Senior Organizations, the National Association  
of State Units on Aging, the California State Office  
on Aging and the Gray Panthers.**

**Interest of Amicus.**

This brief amicus curiae is filed without motion, as permitted by Rule 42, the prior consent of the parties having been obtained. See Exhibit "A", attached hereto.

Your amicus the National Association of State Units on Aging represents all state units on aging which are funded by the Administration on Aging of the Department of Health, Education and Welfare. The Administration on Aging has recently provided funds to the various state units on aging for the purpose of expanding access of the elderly to legal services.

Your amicus the California State Office on Aging is appearing individually and as a member of the National Association of State Units on Aging.

Your amicus the Mountain Plains Congress of Senior Organizations is funded by the Community Services Administration of the Department of Health, Education and Welfare and is a western, multistate organization.

Your amicus the Gray Panthers is a nonprofit organization with a nationwide membership.

Your amici share the common interest in providing for the advocacy and social service needs of the elderly. It has been their common experience that for low and moderate income elderly, legal services are generally inaccessible. In *Goldfarb v. Virginia State Bar Association*, 421 U.S. 773 (1975), this Court questioned whether the public service aspect of the legal profession should exempt some activities from the Sherman Act. A meaningful evaluation of the private bar's public service vis-a-vis the Sherman Act must be in the context of the need for access to legal services and the need for consumer information regarding legal services and not on a piecemeal basis which considers only the activities of a handful of isolated private attorneys or law firms.

Legal services are largely unavailable to low income persons. A 1975 study conducted for the Legal Services Corporation concluded that:

"... [Legal Services] coverage of the legally eligible low income population is very largely nominal, or theoretical, not actual or effective." *The Legal Services Program: Resource Distribution and Low Income Population*, BUREAU OF SOCIAL SCIENCE RESEARCH, INC., 1975.

Regarding provision of legal services to low income persons, Thomas Ehrlich, President of the Legal Services Corporation has said:

"Whatever our success over the next few years in gaining increased federal funding for legal assistance to the poor, the goal of equal access to justice cannot be met without substantially increased involvement of the private bar. . . ."<sup>1</sup>

For the elderly the problem is even greater; indeed, Congress recently enacted legislation which placed a special emphasis on providing legal services for the elderly.<sup>2</sup>

Recognition that the legal profession should endeavor to correct deficiencies in our legal system is embodied within Canon 8 of the ABA Code of Professional Responsibility which provides:

"Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein.

<sup>1</sup>Remarks of Thomas Ehrlich, President of the Legal Services Corporation, on "Justice for the Poor: Public and Private Responsibilities" before the Los Angeles County Bar Association, May 5, 1976.

<sup>2</sup>Older Americans Act Amendments of 1975, P.L. 94-135, 89 Stat. 713, 94th Cong. 1st Sess., 42 U.S.C. §3001 *et seq.*



Thus, they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients." (EC 8-1).

The little information available indicates that one of the most significant roadblocks to fixed income persons obtaining legal services is their lack of information regarding the cost and availability of such services. A recent study conducted in Cedar Rapids, Iowa, indicated that 20% of the elderly responding could not afford to hire an attorney (should a legal problem arise) and 37% did not know if they could afford an attorney.<sup>3</sup> Moreover, your amici believe, advertising is a necessary component of innovative service delivery systems designed to reduce costs, based upon volume and, *e.g.*, the use of paralegals in standardized and specialized tasks. Neither the public service activities of the private bar nor the presently constituted fee for service arrangements are sufficient to meet the need of low and fixed income persons.

#### Summary of Argument.

The Appellee, an integrated State Bar Association, is subject to Section 1 of the Sherman Anti-Trust Act. The purpose of the Act is to preserve a market system based upon the laws of supply and demand and, hence, to prevent combinations which inhibit the natural operation of those laws. While some combinations in restraint of trade are lawful because reasonably

<sup>3</sup>C. GORDON, REPORT ON A MODEL PROJECT: AREA X AGENCY ON AGING LEGAL SERVICES PROGRAM, Kirkwood Community College, Cedar Rapids, Iowa.

related to proper social or economic objectives, others are unlawful *per se* because of their unequivocal and direct relationship to the suppression of competition. Among the latter is price fixing.

Price fixing includes any scheme which directly or indirectly has the effect of subjecting prices to artificial pressures unrelated to a free market. Unlawful price fixing does not depend upon the existence of a plan to peg prices at specified amounts or to relate them to particular formulas; it is only necessary that a degree of market stability be attained which, but for said plan, would not exist. Furthermore, the specific intent to fix prices is unnecessary, it being presumed that the parties to an agreement, the effect of which is to influence prices, intended the necessary and direct consequences of their acts.

Price competition and price advertising are inextricably related and the free operation of the former is dependent upon the freedom to do the latter. With respect to consumers, price advertising facilitates choice; with respect to sellers, price advertising encourages competition. Furthermore, the absence of price advertising, with its attendant shroud of secrecy, fosters a climate in which price fixing can be accomplished through the unspoken gentlemen's agreement. Accordingly, restrictions upon price advertising are, *ipso facto*, price fixing. To the extent the disciplinary rule at issue is designed to prevent unscrupulous practices, other means are available to accomplish that objective without the corollary effect of inhibiting price advertising.

**ENFORCEMENT BY THE APPELLEE OF THE  
DISCIPLINARY RULE AT ISSUE IS A VIOLA-  
TION PER SE OF SECTION 1 OF THE SHER-  
MAN ANTI-TRUST ACT.**

**I.**

**This Court Has Equated Restrictions on Price  
Advertising With Price Fixing.**

An integrated state bar association is prohibited by Section 1 of the Sherman Act, 15 U.S.C. §1 (hereafter “§1”), from engaging in price fixing. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) Price fixing, whatever its manifestation, is a violation *per se* of §1 and, hence, its underlying reasonableness, utility, or socio-economic rationale is immaterial. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). A scheme, the effect of which is to immunize prices, in whole or in part, from the free play of economic forces is unlawful regardless of the intent of the parties, *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *United States v. Patten*, 226 U.S. 525 (1913); and the degree of market interference or its particular form is beside the point:

“ . . . Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. . . .” *United States v. Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 221.

Further elaboration of the above principles would be tautologous. Their specific application to the facts of the instant case has been established through decisions of this court and decisions of the lower courts. It might be thought that restrictions on advertising would be an unlikely subject for judicial scrutiny under §1; the usual motive of price fixers is to sell as much as possible and it is logical to suppose that the usual price-fixing combination would not be concerned with advertising inhibitions. Such was not the case, however, with the defendant in *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), who undertook to discourage retailers of its pharmaceutical products from discount selling through the medium of commitments not to advertise:

“ . . . Its officials believed that the selling at discount prices would be deterred, and the effects minimized of any isolated instances of discount selling which might continue, if all advertising of such prices were discontinued. . . .” 362 U.S. at 35.

The central issue in the case was whether the defendant transgressed beyond the grounds of *United States v. Colgate*, 250 U.S. 300 (1919), which sanctioned unilateral refusals to deal with retailers who failed to adhere to a pricing policy. In holding that it did, this court used the following language relative to advertising:

“ . . . With regard to the retailers suspension of advertising, Parke Davis did not rest with the simple announcement to the trade of its policy in that regard followed by a refusal to sell to the retailers who would not observe it. First it discussed the subject with Dart Drug. When Dart



indicated willingness to go along the other retailers were approached and Dart's apparent willingness to cooperate was used as the lever to gain their acquiescence in the program. Having secured those acquiescences, Parke Davis returned to Dart Drug with the report of that accomplishment. Not until all this was done was the advertising suspended and sales to all the retailers resumed. . . . [I]f a manufacturer is unwilling to rely on individual self-interest to bring about general voluntary acquiescence *which has the collateral effect of eliminating price competition*, and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customers' acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product. The product then becomes packaged in a competition-free wrapping—a valuable factor in itself—by virtue of concerted action induced by the manufacturer. . . .” 362 U.S. at 46-47 (Emphasis added).

It is submitted that *Parke, Davis* is directly in point. It necessarily holds that a policy of foreclosing advertising is a form of price fixing, since the tactic condemned permitted discount selling in conjunction with discontinuance of advertising. While the objective of *Parke, Davis* was to discourage such discount selling, the means used included the banning of advertising; if the latter had no effect upon the former, there would have been no factual basis for a finding of price-fixing.

Likewise in point is *United States v. General Motors*, 384 U.S. 127 (1966), a decision which found the

defendant guilty of violating §1 through concerted action by General Motors and various southern California Chevrolet dealers to discourage the practice by other dealers of marketing automobiles through “discounters” who advertised the availability of new cars for lower prices. The following statement represents this court's evaluation of the effect of advertising by the discounters:

“We note, moreover, that inherent in the success of the combination in this case was a substantial restraint upon price competition—a goal unlawful *per se* when sought to be effected by combination or conspiracy. . . . And the *per se* rule applies even when the effect upon prices is indirect. . . .

“There is in the record ample evidence that one of the purposes behind the concerted effort to eliminate sales of new Chevrolet cars by discounters was to protect franchised dealers from real or apparent price competition. The discounters advertised price savings. . . . Some purchasers found and others believed that discount prices were lower than those available through the franchised dealers. . . .” 384 U.S. at 147.

It is submitted that this Court's finding of “ample evidence” of a purpose “to protect franchised dealers from real or apparent price competition” is an explicit recognition of the correlation between price advertising and price competition. Below, your amicus will treat in detail *Schnapps Shop, Inc. v. H. W. Wright & Co., Ltd.*, 377 F.Supp. 570 (D. Md. 1973), but the following observation by the court is apropos here:

“. . . When a retailer is free to advertise at any price, he alerts his competitors and his customers and often obliges his competitors to advertise



and sell at a price competitive with the advertised price. . . ." 377 F.Supp. at 581 (Emphasis the Court's).<sup>4</sup>

## II.

### **The Prevailing Rule in the Lower Courts Is That Restrictions on Price Advertising Are Synonymous With Price Fixing.**

The decisions of the lower courts appear to be unanimous in condemning bans on price advertising, or their equivalent, as synonymous with price fixing. In *United States v. Gasolene Retailers Assn., Inc.*, 285 F.2d 688 (7th Cir. 1961), the court read a *per se* violation of §1 into a series of collective bargaining agreements providing that retail gasoline service stations would not advertise prices, a device designed to prevent gas wars. In the language of the court:

"In the Socony-Vacuum case the activities were not concerned with direct price fixing but were aimed rather at affecting the market price and the court was there condemning as price fixing any concerted scheme designed to affect prices. We are of the opinion that the agreement and the activities in the present case are a *per se* violation of the Sherman Act." 285 F.2d at 691.

<sup>4</sup>Cf. Samuelson, *ECONOMICS* p. 43 (8th ed. 1970):

"As we said earlier, one drawback to the picture of the price system as described above is the fact that, in the real world, competition is nowhere near 'perfect.' Firms do not know when consumer tastes will change; therefore they may overproduce in one field and underproduce in another. By the time they are ready to learn from experience, the situation may have changed again. Also, in a competitive system many producers simply do not know the methods of other producers, and costs do not fall to a minimum. In the competitive struggle one can sometimes succeed as much by *keeping knowledge scarce* as by keeping production high."

*Schnapps Shop, Inc., v. H. W. Wright & Co., Ltd.*, *supra*, 377 F.Supp. 570 (D. Md. 1973), found a *per se* violation of §1 in an enforced policy against advertising below suggested retail prices of liquor, relying heavily upon *General Motors* and *Parke, Davis*:

"Because they only sought to affect advertised prices, and not retailers in-store prices, both defendants contend they did not run afoul of Sherman §1. Defendants cite no cases to support that distinction, and with good reason, for the argument is misconceived. . . . [quoting from *Parke, Davis*] . . . In these two cases, the inference is also irresistible that combining to prevent advertising below suggested retail price, or below any price, will have an impact on price competition. When a retailer is free to advertise at any price, he alerts his competitors and his customers and often obliges his competitors to advertise *and sell* at a price competitive with the advertised price. . . .

"Defendants can find no comfort in arguing that preventing advertising at low prices has only an indirect effect on the prices themselves. . . . It is a basic tenet of antitrust law that any conspiracy which has an impact on the price structure is illegal. . . ." 377 F.Supp. at 580-581.

In *United States v. National Society of Professional Engineers*, 389 F.Supp. 1193 (D. D.C. 1974), the court, relying upon *Socony-Vacuum*, held the defendant guilty of price fixing through adherence of its members to an ethical canon designed to prevent competitive bidding; competitive bidding was defined as follows:

". . . [T]he formal or informal submission, or receipt, or verbal or written estimates of cost

or proposals in terms of dollars, man days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer . . . has been selected for negotiations. . . ." 389 F.Supp. at 1195 n. 1.

*Oakland-Alameda County Builders Exchange v. F. P. Lathrop Construction Co.*, 4 Cal.3d 354, 482 P.2d 226 (1971), likewise emphasized the price-fixing characteristics of a scheme calculated to shroud competitive bidding in secrecy. (California has adopted the *per se* rule with respect to price fixing.) At issue was a procedure the effect of which was to preserve secrecy concerning the amount of subcontractors' bids before the award of general construction contracts; the purpose was to discourage general contractors from playing subcontractors off against each other. In holding the practice added up to price-fixing the California Supreme Court stated:

" . . . It should be apparent that the 'economic forces of supply and demand' can have little impact on a bidding system which is conducted in secrecy and which leaves general contractors no alternative but to accept the lowest bids submitted through the Depository or withdraw from the bidding. . . .

" . . . In the instant action, participants in the Depository impose a rule of silence no less stifling to open price competition than the agreement not to advertise, and they do so in the guise of preventing the competitive evil of 'bid peddling.' As in *Gasolene Retailers*, the sellers (subcontractors) agree not to publicize their prices (bids) and the buyers (general contractors) are

deprived of the benefit of purchasing at the lowest price available in a free enterprise system of open price competition." 4 Cal.3d at 363-364; 482 P.2d at 232.

### III.

#### **The Intent Underlying the Disciplinary Rule Is Immaterial.**

That the disciplinary rule<sup>4</sup> at issue was perhaps not inspired by a desire to curtail price competition is immaterial.<sup>5</sup> In *United States v. Patten*, *supra*, 226 U.S. 525 (1913), a price-fixing case, though decided before the *per se* rule was enunciated specifically, see

<sup>4</sup>DR 2-101(B), quoted at page 2 of the lower court's opinion, was borrowed from DR 2-101(B) of the Code of Professional Responsibility suggested by the American Bar Association. That disciplinary rule, in turn, implements Canon 2, EC 2-9, which provides:

"The traditional ban against advertising by lawyers, which is subject to certain limited exceptions, is rooted in the public interest. Competitive advertising would encourage extravagant, artful, self-laudatory brashness in seeking business and thus could mislead the layman. Furthermore, it would inevitably produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers. Thus, public confidence in our legal system would be impaired by such advertisements of professional services. The attorney-client relationship is personal and unique and should not be established as the result of pressures and deceptions. History has demonstrated that public confidence in the legal system is best preserved by strict, self-imposed controls over, rather than by unlimited, advertising."

The succeeding paragraph of the Canon, EC 2-10, provides: "Methods of advertising that are subject to the objections stated above should be and are prohibited. . . ." The instant case is concerned with only an objective listing of fees for specified services and would not seem "subject to the objections stated above" because there is no element of deception involved. While the Arizona Supreme Court's interpretation of its own rules is a *fait accompli* for present purposes, the validity of that interpretation is, it is submitted, highly questionable.



*United States v. Trenton Potteries Co.*, *supra*, 273 U.S. 392 (1927), this court stated:

" . . . And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say to the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. . . ." 226 U.S. at 543.

The "objective" test of intent was reaffirmed in *United States v. Masonite Corp.*, 316 U.S. 265 at 275 (1942), a price-fixing case decided after the *per se* rule became crystalized, see *United States v. Socony-Vacuum Oil Co.*, *supra*, 310 U.S. 150 (1940). In short, ". . . any combination which tampers with price structures is engaged in an unlawful activity. . . ." *Socony-Vacuum*, 310 U.S. at 221.

Given the existence of price fixing, the avowed purpose of the ethical canon underlying the disciplinary rule to prevent deceitful practices, see note 1, *supra*, is immaterial. In the language of the court in *American Medical Ass'n v. United States*, 130 F.2d 233 (D.C. Cir. 1942) *aff'd* 317 U.S. 519 (1943):

" . . . Neither the fact that the conspiracy may be intended to promote the public welfare, or that of the industry, nor the fact that it is designed to eliminate unfair, fraudulent and unlawful practices, is sufficient to avoid the penalties of the Sherman act." 130 F.2d at 249.

The Sherman Act ". . . has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. . . ." *Socony-Vacuum*, 310 U.S. at 222.

#### IV.

#### Reversal of the Lower Court's Decision Will Not Impinge Upon Arizona's Interest in Regulating Its Legal Profession.

Of course, as this court noted in *Goldfarb*, the states, through integrated bar associations and otherwise, have a legitimate interest in regulating other professions. Unquestionably, reasonable limitations can be imposed upon advertising methods designed by professionals ". . . to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them. . . ." *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 at 612 (1935). However, as stated above, otherwise laudable objectives are impermissible if in conflict with the *per se* rule flowing from §1. Actually, if the disciplinary rule were limited to the spirit and intent of the canon it implements ("extravagant, artful, self-laudatory brashness in seeking business"), no problems would exist. The issue in this case involves price competition in its purest form, *i.e.*, the objective and unembellished presentation to the public of a list of services the appellants propose to offer at objectively stated prices.<sup>8</sup>

<sup>8</sup>Implicit in the above paragraph are two perspectives from which advertising may be viewed. Puffery, brashness, and artfulness are calculated to mislead the consumer while pure price advertising is calculated to inform the consumer. The following quote illustrates the distinction:

(This footnote is continued on next page)



V.

**Reversal of the Lower Court's Decision Is Required to Give Goldfarb Practical Significance.**

Because price advertising is an essential component of price competition, it is apparent the effect of the lower court's decision is to emasculate *Goldfarb* in the state of Arizona. Ingrained within the legal profession, and quite properly so, is a spirit of camaraderie and mutual dependence. For example, the American Bar Association Code of Professional Responsibility provides, in Canon 2, EC 2-18:

" . . . It is a commendable and long-standing tradition of the bar that special consideration is

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"The crucial difference between the two views of the role of advertising is that in the change-in-taste approach, advertising increases product differentiation, makes demand curves *less* elastic, and leads to higher prices; while in the information approach advertising makes demand curves *more* elastic and leads to *lower* prices. According to Nelson, the costs of obtaining and the costs of supplying information are both greater than zero, so consumers will rationally make decisions with less than total information. His basic point is that consumers lack of information produces less elastic demand curves, because elasticity of demand is a function of *known* alternatives, not the number of brands in existence. Therefore, it is not the existence of close substitutes that is important, but the probability that the consumer will find them. Consumers' lack of information is the primary determinant of monopoly power, which is measured by the price elasticity of demand. The essence of his analysis is that advertising, by providing information about brand qualities, *increases* elasticities of demand curves and *reduces* monopoly power over price." *Ferguson, ADVERTISING & COMPETITION: Theory, Measurement, Fact* 5 (1974) (Ballinger Publishing Co., Cambridge, Mass.).

While the foregoing quote was focused upon "providing information about brand qualities," in which event it may be viewed in two modes, *i.e.*, either information or "change-in-taste," it is relevant to the point made above; pure, unembellished price advertising is necessarily of only the informative variety.

given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family."

Canon 1, EC 1-6, which prescribes the duty of lawyers with respect to fellow lawyers disqualified from practice because of mental or emotional instability, provides in part:

" . . . In like manner, when the disqualification has terminated, members of the bar should assist such person in being licensed, or, if licensed, in being restored to his full right to practice."

In *United States v. Container Corporation of America*, 393 U.S. 333 (1969), this court found a *per se* violation of §1 in the exchange of price information among competitors in an industry where " . . . The demand is inelastic, as buyers place orders only for immediate, short run needs. . . ." 393 U.S. at 337:

" . . . The inferences are irresistible that the exchange of price information has had an anti-competitive effect in the industry, chilling the vigor of price competition. . . .

"Price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition." 393 U.S. at 337-338.

Indeed, in *Goldfarb* this court recognized the competitive restraint implicit in the fact that " . . . the motivation to conform was reinforced by the assurance that other lawyers would not compete by underbidding. . . ." 421 U.S. at . . ., 95 S.Ct. at 2010. See also *United States v. Parke, Davis & Co.*, *supra*, 362 U.S. at 46, 47.

Because minimum fee schedules were common prior to *Goldfarb* it is obvious they were favored by at least a substantial number of practicing attorneys. See *Goldfarb*, 421 U.S. at .... n. 16, 95 S.Ct. at 2013 n. 16. Tied as many of such minimum fees were to the application of arithmetic to objective criteria, e.g., in mortgage foreclosures, real estate transactions and probates, it is reasonable to suppose that the effects of *Goldfarb* will be minimal without more. Given the traditional spirit of mutual cooperation existing within the legal profession (viewed as an organized group as distinguished from adversaries among themselves representing clients) and the historical disfavor of price competition, the result is predictable unless the windows are thrown open and the light of true, informative price information permitted to shine. In addition to the fact the existing shroud of secrecy almost certainly discourages price competition, in the case of the legal profession it conceals it because of the attorney-client privilege.

#### Conclusion.

At issue in the instant case is an advertisement listing four uncomplicated legal tasks and the sum, expressed in dollars, for which the appellants will perform each of them. There is nothing in the advertisement which would mislead anybody; on the contrary, while it may be inspired by the profit motive, from the standpoint of the potential consumer its sole office is education. Price competition presupposes choice by informed consumers and the function of the advertisement at issue is precisely that.

Because price advertising is inherent in price competition, restrictions upon the former are a form of fixing

the latter. Reasonable limitations upon advertising in general can be legally justified as a means of protecting the public from misrepresentation, deceit, and, in the case of the legal profession, inflated expectations and other forms of misapprehension. This value is, however, unrelated to an advertisement which objectively states a fixed sum in return for a specified service. As a necessary corollary to *Goldfarb*, the decision of the lower court should be reversed. The nature of the legal profession provides a particularly strong reason for that conclusion, but it would follow regardless of the occupation or commercial activity involved.

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*Of Counsel.*

**EXHIBIT A.**

Dear Mr. Cohen:

In answer to your request, appellant hereby gives its consent to the filing of an *amicus* brief on behalf of the Mountain Plains Congress of Senior Organizations, the National Association of State Units on Aging, the California State Office on Aging, and the Gray Panthers.

William C. Canby, Jr.  
Attorney for Appellants

Dear Mr. Cohen

In answer to your request, appellee hereby gives its consent to the filing of an *amicus* brief on behalf of the Mountain Plains Congress of Senior Organizations, the National Association of State Units on Aging, the California State Office on Aging, and the Gray Panthers.

John P. Frank  
Attorney for Appellee



Supreme Court, U. S.

FILED

NOV 18 1976

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1976

**No. 76-316**

JOHN R. BATES and VAN O'STEEN,

*Appellants,*

v.

STATE BAR OF ARIZONA,

*Appellee.*

On Appeal from the  
Supreme Court of Arizona

**BRIEF OF *AMICI CURIAE* CONSUMERS UNION OF  
UNITED STATES, INC., PUBLIC CITIZEN, AND THE  
NATIONAL CONSUMER CENTER FOR LEGAL SERV-  
ICES, URGING REVERSAL OR, IN THE ALTERNA-  
TIVE, VACATION OF ORDER BELOW AND REMAND  
FOR FURTHER PROCEEDINGS**

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**BRIEF OF *AMICI CURIAE* CONSUMERS UNION OF  
UNITED STATES, INC., PUBLIC CITIZEN, AND THE  
NATIONAL CONSUMER CENTER FOR LEGAL SERV-  
ICES, URGING REVERSAL OR, IN THE ALTERNA-  
TIVE, VACATION OF ORDER BELOW AND REMAND  
FOR FURTHER PROCEEDINGS**

---

**INTEREST OF *AMICI CURIAE***

*Amici* are national consumer-oriented organizations whose interests will be directly affected by the disposition of this action. Each *amicus* has a significant organizational interest in improving the availability and efficient delivery of legal services. Further, each represents the interest of its individual members and supporters in obtaining important information about the lawyers who are available to represent them and provide them access to the legal system.

Consumers Union of United States, Inc. ("Consumers Union") is a non-profit membership organization chartered under the laws of the State of New York to provide information, education and counsel about consumer goods and services and the management of the family income, and to advance the consumer interests of its several hundred thousand members. Consumers Union is supported almost entirely by income derived from the sale of *Consumer Reports* and other publications which carry no advertising and receive no commercial support. Beginning in 1974, Consumers Union has attempted to publish a consumers' directory of lawyers practicing in Northern Virginia but has been unable to do so because of advertising restrictions that are identical to those involved in this action. Suits filed by Consumers Union challenging the constitutionality of those restrictions are currently pending before three-judge district courts in the Eastern District of Virginia and the Northern District of California, with the former case having been submitted to the three-judge court on the basis of an extensive factual record, on May 18, 1976.<sup>1</sup>

Public Citizen is a non-profit organization supported by public contributions from approximately 175,000 individuals. Public Citizen engages in a wide variety of activities on behalf of consumers and is particularly concerned about laws which prohibit advertising by professionals, thereby interfering with consumers' access to vital information. Attorneys for Public Citizen represented the

<sup>1</sup> *Consumers Union of United States, Inc., et al. v. American Bar Association, et al.*, No. 75-0105-R (E.D. Va.); *Consumers Union of United States, Inc., et al. v. State Bar of California, et al.*, No. C-75-2385 SC (N.D. Cal.).

consumer plaintiffs in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, \_\_\_ U.S. \_\_\_, 96 S. Ct. 1817 (1976). In addition, Public Citizen has challenged the constitutionality of prohibitions on advertising by physicians, which restrictions interfered with Public Citizen's efforts to publish a consumers' directory of physicians in Prince George's County, Maryland.<sup>2</sup>

The National Consumer Center for Legal Services is a non-profit organization funded by its members, which include labor unions, cooperatives, credit unions, and other groups that represent the consumer interests of their individual members. The Consumer Center represents more than 27,000,000 consumers of legal services throughout the United States. A principal purpose of the Consumer Center is to foster the growth and development of all types of legal service delivery plans and to provide assistance to individuals and organizations wishing to establish such group plans. The successful establishment and operation of effective institutions for the delivery of legal services requires the ability to disseminate information about those institutions through various methods, including advertising.

*Amici* in this case assert the interests of consumers in having meaningful access to information necessary to enable them, with a minimum of difficulty and cost, to

<sup>2</sup> *Public Citizen, et al. v. Commission on Medical Discipline of Maryland, et al.*, No. 74-56B, D. Md. (three-judge court), dismissed on abstention grounds June 24, 1976, appeal pending No. 76-1944 (4th Cir.). An identical challenge to a Virginia statute prohibiting physician advertising has recently been upheld. *Health Systems Agency of Northern Virginia, et al. v. Virginia State Board of Medicine, et al.*, No. 76-37-A (E.D. Va.) (three-judge court), decided November 9, 1976.

make informed selections of legal counsel. While the informational interests of consumers may be similar to the commercial interests of lawyers who wish to advertise, they are not identical. For example, *amicus* Consumers Union has been effectively prevented by advertising restrictions identical to those here at issue from publishing a consumer-oriented directory to assist its members and other consumers in finding appropriate counsel. Such directories would contain much information that lawyers may or may not see fit to advertise individually, such as the nature of their practice, the types of clients represented, potential conflicts of interest, and fee information. Consequently, the contentions of *amici* will assist this Court in resolving the constitutional issues raised in the present dispute.

*Amici* will not address the Sherman Act issues in this case, but will discuss the First Amendment issues only.

#### SUMMARY OF ARGUMENT

Advertising of the cost and availability of specific legal services implicates fundamental First Amendment rights. See, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, \_\_\_ U.S. \_\_\_, 96 S. Ct. 1817 (1976). When a flat prohibition on professional advertising such as Disciplinary Rule 2-101(B) is challenged on First Amendment grounds, "a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the [prohibition] . . .". *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).

A series of decisions of this Court beginning with *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), and running through *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971), have consistently held (1) that in balancing

the interests, the First Amendment values in maximizing lay access to and information about the legal system are so weighty that restricting such values would only be justified if it were demonstrated that the restriction would in fact advance a "compelling" or "paramount" public purpose; and (2) that the restriction must be "no broader than necessary to achieve" that public purpose. The Supreme Court of Arizona has not even addressed this delicate balancing task. Its failure to do so requires reversal.

This Court's analysis in the *Board of Pharmacy* case also makes clear that even if the court below had engaged in a proper balancing of the interests, Disciplinary Rule 2-101(B) could not survive a First Amendment challenge. The Rule conflicts with a lawyer's ethical obligation under Canon 2 to assist lay persons in the selection of counsel and recognition of legal problems. The Rule not only restricts First Amendment rights of speech and press, but suppresses information affecting access to other vital activities protected by the First Amendment. The several justifications for the advertising ban rejected in the *Board of Pharmacy* case are even less supportable in the case of the advertising at issue here. Finally, the Rule is wholly unnecessary to vindicate Arizona's interest in preventing lawyers from disseminating false or misleading information.

In the *Board of Pharmacy* case, this Court noted that a lawyer advertising case might require consideration of various factors bearing on the validity of an advertising ban such as the Rule. Nevertheless, the court below gave no consideration whatsoever to any such factors, made no findings concerning the very important factual issues raised by the Rule, and made no effort to balance the interests at stake. While those failures plainly require reversal, the obvious overbreadth of the Rule — which on its face prohibits countless truthful statements by lawyers which would



assist consumers in exercising their First Amendment rights — makes a remand unnecessary “because the outcome is readily apparent . . .”. See, *Bigelow v. Virginia*, *supra* at 826-27.

## ARGUMENT

### ARIZONA’S FLAT PROHIBITION ON ALL ADVERTISING BY ATTORNEYS, BOTH ON ITS FACE AND AS APPLIED, VIOLATES THE FIRST AMENDMENT.

#### A. The Supreme Court of Arizona Has Failed to Analyze Or Balance the Interests In This Case.

Last term, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, \_\_\_ U.S. \_\_\_, 96 S. Ct. 1817 (1976) (hereinafter “*Board of Pharmacy*”), this Court prescribed the constitutional standards to be applied in testing advertising prohibitions against the First Amendment. It held that the advertising of the price of prescription drugs was constitutionally protected speech; the State could not, consistent with the First Amendment, “completely suppress the dissemination of concedely truthful information about entirely lawful activity, fearful of that information’s effect upon its disseminators and its recipients.” *Id.* at 1831.<sup>3</sup>

<sup>3</sup> The Court stressed that “the . . . consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate” (*id.* at 1826), and that from society’s point of view, such information “may be of general public interest” and indeed “indispensable” to the formation of rational consumer choice in “a predominantly free enterprise economy.” *Id.* at 1827.

After the *Board of Pharmacy* case, therefore, it is clear that advertising of the cost and availability of specific legal services implicates fundamental First Amendment interests. That being so, a delicate balancing of interests is required. As the Court recently stated in *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975):

. . . Regardless of the particular label asserted by the State — whether it calls speech “commercial” or “commercial advertising” or “solicitation” — a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation. . .

And as this Court further stated, “[t]he task of balancing the interests at stake here was one that should have been done by the . . . courts before they reached their decision.” *Id.* at 826. As discussed *infra*, the Supreme Court of Arizona has wholly failed to even address this task, and that failure alone requires reversal.

This Court has prescribed how that balancing task must be performed. It has held that although First Amendment rights are not absolute, “these freedoms are delicate and vulnerable, as well as supremely precious in our society.” *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963). Thus, any restriction on their exercise, even one not involving prior restraint and even one that is indirect, is not tolerated unless (1) it achieves a public interest that is “compelling” or “paramount,” and (2) its infringement on those rights is “no broader than necessary to achieve” that public interest. *N.A.A.C.P. v. Button*, *supra* at 438, 444; *Branzburg v. Hayes*, 405 U.S. 665, 680-81 (1972), and numerous cases cited at fns. 18 and 19. Moreover, the *particular* restriction at issue, rather than any generalized justification for

the restriction, must meet this two-part test. *E.g.*, *Bates v. Little Rock*, 361 U.S. 516, 525 (1960) (fundamental state interest in taxation could not justify requirement to disclose membership list).

Thus, the fact that "[t]he interest of the States in regulating lawyers is especially great," *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975), is the beginning of the necessary judicial inquiry, not the end of it. Indeed, this Court has struck down on First Amendment grounds many restrictions imposed by the legal profession purportedly in the interest of regulating professional conduct. In *N.A.A.C.P. v. Button*, *supra*, for example, the Court explicitly recognized Virginia's valid interest in regulating conduct that resulted in stirring up litigation, conduct traditionally censured at common law. The Court nevertheless concluded that "[t]he State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions it has imposed." 371 U.S. at 444. It was "no answer," the Court stressed, that the restriction was intended to insure high professional standards, "[f]or a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." (Emphasis supplied). 371 U.S. at 438-39.<sup>4</sup>

<sup>4</sup> *Accord*, *Baird v. Arizona*, 401 U.S. 1 (1971), and *In re Stolar*, 401 U.S. 23 (1971), where this Court ruled that a state's interest in making sure that those admitted to practice law were of good moral character was insufficient to force an applicant to answer questions about his beliefs or associations. See, *Nicholson v. Board of Com'rs. of Alabama State Bar Assn.*, 338 F. Supp. 48 (M.D. Ala. 1972) (three-judge court) (state cannot require a bar applicant to take an oath invoking the help of God as a prerequisite to admission to practice).

Subsequent to *Button*, this Court has continued to consistently recognize the legitimate interest of the states in enforcing ethical conduct by attorneys, but has just as consistently refused to be beguiled by the label "legal ethics." In *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964), *United Mine Workers of America v. Illinois State Bar*, 389 U.S. 217 (1967), and *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971), the Court struck down ethical rules which had the effect of burdening access to legal services, and the Court did so despite the clearly commercial nature of the legal services in question.<sup>5</sup> Indeed, just last year, the Court while recognizing the state's "compelling interest" in regulating lawyers, struck down the "ethical" principle in question (a minimum fee schedule), and did so on non-constitutional grounds. *Goldfarb v. Virginia State Bar*, *supra*, 421 U.S. at 793-94.

The *United Transportation Union* case is particularly instructive. There, the Court approved an arrangement challenged by the state bar as "unethical," in which the group paid investigators to (1) keep track of ordinary personal injury accidents, (2) visit injured members, taking contingent fee contracts with them, and (3) urge members to

<sup>5</sup> Thus in *Railroad Trainmen*, the group solicited substantially all of the members' personal injury claims, on a fee basis, for lawyers selected and touted by the union in literature and at meetings. The two dissenters stressed the commercial nature of this activity. 377 U.S. at 9. In *United Mine Workers*, the Court explicitly considered and rejected the argument that *Button* should be limited to efforts to encourage the assertion of political rights. 389 U.S. at 223. And see discussion of *United Transportation Union*, *infra*.



engage named private attorneys selected (but not employed) by the union who had agreed with the union (not the individual client) to charge a standard fee prescribed in advance. This scheme is especially relevant to the instant case, for even the dissenters agreed that the group could not be prevented from setting standard fees to be charged by the lawyers for specified services *in advance of even a consultation with the member client*. 401 U.S. at 595 and 600. If that conduct is constitutionally protected, then a mere advertisement of the availability and cost of several defined legal services cannot be flatly prohibited by appellee.

The *Button* through *United Transportation Union* line of cases is dispositive of the present case for another reason: the Court in these cases stressed again and again, in the face of analogous restrictions on First Amendment rights, that in balancing the interests, the *quality* of factual evidence required to sustain the bar's predictions of evils flowing from the allegedly "unethical" conduct must be reasonably high. Thus, in *United Mine Workers*, the Court carefully reviewed each of the factual contentions made by the state bars in *Button* and *Railroad Trainmen* and held that the bars' predictions of evils were "far too speculative" (in *Button*) and merely a "theoretical" and "very distant possibility of harm" (in *Railroad Trainmen*). 389 U.S. at 222-24. See also, *United Transportation Union*, *supra* at 583-84. And very recently, the Court has twice rejected as being without factual support precisely the same "ethical" arguments against advertising that presumably underlie Disciplinary Rule 2-101(B). *Bigelow v. Virginia*, *supra* at 826-27; *Board of Pharmacy*, *supra* at 1828-30. In light of the record below, the instant case is plainly *a fortiori*.

**B. Disciplinary Rule 2-101(B) Is So Overbroad That It Cannot Be Sustained On This Or Any Other Record.**

After the *Board of Pharmacy* case, however, it is apparent that even if the court below had engaged in a proper balancing of the interests, it would have been compelled to invalidate Disciplinary Rule 2-101(B). First, the *Board of Pharmacy* case involved a restriction on pure commercial speech, "speech which does 'no more than propose a commercial transaction,'" and the Court assumed that the advertisers' interest there was "a purely economic one." 96 S. Ct. at 1826. In the instant case, however, appellants have discharged an affirmative *ethical obligation* imposed under Canon 2 of the Code of Professional Responsibility of the American Bar Association, adopted by the Supreme Court of Arizona,<sup>6</sup> to assist lay persons in the selection of counsel and in the recognition of legal problems.<sup>7</sup>

Second, the information suppressed by Disciplinary Rule 2-101(B) does not relate simply to a decision to purchase a product in the marketplace, as in *Board of Pharmacy*. Rather, the information relates to legal services, full access to which enjoys full First Amendment protection. See, e.g., *N.A.A.C.P. v. Button*, *supra* at 434, 437, 440, 442.

Third, the Court in *Board of Pharmacy* considered at length the numerous alleged evils which might ensue if price advertising were permitted (e.g., tastelessness of some

<sup>6</sup> Rule 29(a) of the Rules of the Supreme Court of Arizona.

<sup>7</sup> See, e.g., Code of Professional Responsibility of the American Bar Association, Ethical Considerations 2-1 through 2-8.



advertising, loss of an individualized relationship with the lay person, reduced quality, inflated costs, diminished professional status, excessive consumer preoccupation with price factors). In rejecting these speculations, this Court stressed that these purported state interests were "greatly undermined" because (a) the practice of pharmacy was subject to "close regulation" to assure high professional standards, (b) the advertising ban "does not directly affect professional standards one way or the other" but simply keeps consumers "in ignorance of the entirely lawful terms that competing pharmacists are offering," and (c) the information "is not in itself harmful" and can be used by consumers to pursue "their own best interests." *Id.* at 1829.

All of this is true *a fortiori* in the instant case. Although neither the Supreme Court of Arizona nor the State Bar of Arizona made *any* findings of fact with respect to either the purpose or effects of Disciplinary Rule 2-101(B) or the likelihood that certain alleged evils would follow its demise, the State Bar can be expected to offer justifications for Disciplinary Rule 2-101(B) similar to those advanced by the state in *Board of Pharmacy*.<sup>8</sup> They are similarly without merit. Lawyers are more closely regulated than pharmacists, and would remain subject to discipline for the evils which the State Bar has conjured up, even if Disciplinary Rule 2-101(B) were struck down. *See infra*. This Rule does not directly affect professional standards but simply increases lay ignorance about individual

<sup>8</sup> *See, e.g.*, Brief of the State Bar of Arizona in the court below, pp. 5-8; *see also*, Brief on the Merits filed by American Bar Association and Brief on Behalf of Defendants Virginia State Bar, *et al.*, filed April 23, 1976, in *Consumers Union of United States, Inc., et al. v. American Bar Association, et al.*, *supra*.

lawyers and the legal services which they can provide; indeed, the Rule's justification — like that rejected in *Board of Pharmacy* — "rests in large measure on the advantages of [citizens] being kept in ignorance." *Id.* at 1829. And appellants' advertisement, far from being harmful in itself, informs consumers about the cost and availability of legal services — and indeed about the possibility of dispensing with certain very routine legal services — and is obviously of value.

Additionally, the Court in *Board of Pharmacy* noted that even if the advertising ban were struck down, Virginia remained free to prohibit false or misleading information, and in fact had done so. *Id.* at 1830-31. In the instant case, false or misleading statements by lawyers would be subject not only to the penalties of Arizona's analogous statute,<sup>9</sup> but would constitute grounds for disbarment under Arizona law as well.<sup>10</sup> Indeed, these remedies would almost certainly be more readily enforceable against a published advertisement than against the same representations made orally in the privacy of a lawyer's office.<sup>11</sup>

Perhaps most significantly, the Court in *Board of Pharmacy* rejected the state's "highly paternalistic approach" to the vindication of admittedly legitimate state interests without even determining whether those interests were in

<sup>9</sup> *See*, Arizona Statutes, Title 44, §§ 1481, 1521-22.

<sup>10</sup> *See*, Arizona Statutes, Title 32, §§ 264, 267(8) and, *e.g.*, Disciplinary Rules 1-102(A)(4) and 6-101(A) of the Rules of the Supreme Court of Arizona.

<sup>11</sup> *See, e.g.*, expert testimony summarized in Plaintiffs' Reply Brief, pp. 20-21 in *Consumers Union of United States, Inc., et al. v. American Bar Association, et al.*, *supra*.

fact served by the restrictions. *Id.* at 1829. It was enough for the Court that Virginia "suppress[ed] the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Id.* at 1831. Here, of course, the court below has permitted the same kind of suppression, and has done so without engaging in any actual analysis at all, much less the delicate balancing of interests required by this Court in *Bigelow v. Virginia*, *supra* and *Board of Pharmacy*.

The State Bar of Arizona will certainly seek to distinguish *Board of Pharmacy* on the ground that pharmacists dispense standardized, prepackaged drug products, while lawyers, as this Court observed, "render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising."<sup>12</sup> *Id.* at 1831, n. 25. See also, concurring opinion of the Chief Justice, *id.* at 1831-32. It is important to note that the Court, in this *dictum*, did not attribute any particular constitutional significance to this distinction, but simply stressed that a lawyer advertising case "may require consideration of quite different factors." (Emphasis supplied). *Id.* at 1831, n. 25.

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<sup>12</sup> Actually, the Board of Pharmacy argued in that case that the practice of pharmacy was highly professional and closely related to the health and safety of all consumers of prescription drug products. In fact, the professional nature of pharmacy, and its importance to the public welfare, was even stipulated in the record. See, Brief of Appellants at 4-7; Stipulation of Facts ¶¶ 11-16. Nevertheless, those professional aspects were not sufficient to offset the consumers' interests in receiving important information in the *Board of Pharmacy* case.

Despite this Court's invitation for further analysis, and despite the heavy burden of justification imposed by *Board of Pharmacy* on advertising bans, one searches the opinion below in vain for any "consideration of" the numerous "factors" bearing on whether Arizona's ban on the advertisement published by appellants can meet the rigorous constitutional tests.<sup>13</sup> *The sole fact upon which the court below rendered its decision was that appellants caused an advertisement for their law office to be published.* (Jurisdictional Statement 2a). Accordingly, there were no findings of fact (or, indeed, even any discussion) concerning, *inter alia*, the following factors: what public interests, if any, the Disciplinary Rule is in fact designed to serve; whether that Rule achieves or in fact subverts those purposes; the extent of consumer ignorance about the cost and availability of such services; whether potential consumers of legal services have a greater need for information about such services than they do for other kinds of services and products; the effect of the Rule upon the cost and availability of legal services and upon consumer ignorance about same; the effect of the Rule upon competition among lawyers; the extent to which the cost and availability of legal services can be advertised in a manner that is neither false nor misleading; whether those particular legal services advertised by appellants are relatively standardized; the extent to which the Rule itself facilitates

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<sup>13</sup> One of these factors ignored by the court below — the possibility that the particular legal services advertised by appellants would not be misleading to consumers, while advertising of other, less standardized legal services might be — is suggested by Chief Justice Burger's concurrence in which he opined that advertising the price of "certain" legal services could be misleading. *Id.* at 1832. And, of course, the advertisement in question here made no "claims of superiority." *Id.* at 1832.



deception of and confusion among potential consumers of legal services; whether a less restrictive limitation on advertising of the cost and availability of legal services could achieve the purposes which the Rule purports to serve; whether the Rule is necessary to prevent false or misleading advertising of legal services and deceptive practices by lawyers; whether the enforceability of other prohibitions against false or misleading advertising or other deceptive practices by lawyers would in fact be increased by the publication of some of the terms on which certain legal services are offered; whether advertising of the cost and availability of certain legal services is misleading simply because it contains some but not all of the information that a potential consumer of such services might wish to have; the extent to which other sources of information about the costs and availability of legal services are available to ordinary consumers and the costs of utilizing such sources; the extent to which efforts by the organized bar to dispel consumer ignorance about the cost and availability of legal services have been unsuccessful; and the extent to which the legal profession itself believes that the advertising ban is excessively broad.<sup>14</sup>

The Supreme Court of Arizona, then, has utterly failed to recognize, much less discharge, its obligation to (1) identify the public purposes which Disciplinary Rule 2-101(B) is designed to serve, (2) establish the factual relationship between this Rule and those public purposes, (3) "assess the First Amendment interest at stake and weigh it against

<sup>14</sup> On November 9, 1976, the Board of Governors of the District of Columbia Bar approved, and recommended that the District of Columbia Court of Appeals adopt, changes in its Code of Professional Responsibility that would permit the kind of advertisement at issue in this case.

the public interest allegedly served by the regulation . . ." (*Bigelow v. Virginia*, *supra* at 826), and (4) demonstrate that the Rule's destruction of the First Amendment rights of appellants and of consumers is no broader than necessary to achieve those purposes. *E.g.*, *N.A.A.C.P. v. Button*, *supra* at 444.

Neither the Rule nor the order of the Supreme Court of Arizona can be sustained on this record. Indeed, in view of the obvious, almost universally-recognized overbreadth of the Rule — which on its face prohibits countless truthful statements by lawyers, which statements can assist consumers to exercise their own First Amendment rights to select counsel and invoke the legal system — *amici* respectfully submit that that Rule and the order of the Supreme Court of Arizona cannot be sustained on any record. As the Court said in *Bigelow v. Virginia*, *supra* at 826-27:

The task of balancing the interests at stake here was one that should have been undertaken by the Virginia courts before they reached their decision. We need not remand for that purpose, however, because the outcome is readily apparent from what has been said above.



## CONCLUSION

For the reasons stated, *amici* respectfully urge this Court to reverse the judgment below and direct the Supreme Court of Arizona to dismiss the proceedings against appellants, or, in the alternative, to vacate the judgment and remand the case for further proceedings, which will include a detailed analysis of the factual predicates for Disciplinary Rule 2-101(B), the public interests served thereby, the appropriate breadth of the Rule's intrusions on First Amendment rights, and a careful balancing of the public interests and the First Amendment rights involved.

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November 18, 1976

No. 76-316

Supreme Court, U. S.  
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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1976

JOHN R. BATES and  
VAN O'STEEN,  
*Appellants,*

v.

STATE BAR OF ARIZONA,  
*Appellee.*

On Appeal From the Supreme  
Court of Arizona

**BRIEF OF THE CHICAGO COUNCIL  
OF LAWYERS, AS AMICUS CURIAE,  
IN SUPPORT OF APPELLANTS**

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On Appeal From the Supreme  
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**BRIEF OF THE CHICAGO COUNCIL  
OF LAWYERS, AS AMICUS CURIAE,  
IN SUPPORT OF APPELLANTS**

This brief is submitted by the Chicago Council of Lawyers as *amicus curiae*, pursuant to written consent by all parties filed with this Court, in support of Appellants' contention that a state-enforced prohibition on advertising by lawyers violates the First Amendment. The Court in this case need not reach, and the Council takes no position on, the question of whether a voluntary agreement by lawyers to restrict their own advertising (whether embodied in the ethical canons of a bar association or otherwise) is in violation of Federal antitrust laws. The type of advertising prohibition involved in the present case is enforced by state authority upon *all* lawyers, including individual

lawyers and associations of lawyers who, like the Council, are of the view that such a restriction is contrary to the ethical and other interests of the legal profession and of the public. Such a state-enforced prohibition cannot be justified under the First Amendment.

### INTEREST OF AMICUS

The Chicago Council of Lawyers is a bar association which was founded in 1969 and currently has approximately 1,100 lawyer members. In 1972 it was admitted as an affiliated local bar association with a seat in the House of Delegates of the American Bar Association. It is involved in a variety of matters affecting the legal profession, including evaluations of candidates for state and Federal judicial positions, the conduct of surveys on the performance of judges, and legislative and other activities relating to substantive areas of the law.

The Council has been concerned for some time about the impact of canons of legal ethics on the delivery of legal services to poor and middle-income persons. In 1971 the Council submitted to the Illinois Supreme Court an extensive report on the entire ABA Code of Professional Responsibility which was then being considered for adoption in Illinois. That Report focused on the extent to which provisions of the Code inhibited fulfillment of the basic professional mandate, set forth in Canon 2, to make legal services available to all persons who need them. It urged that the Illinois Supreme Court reject those provisions of the Code which imposed restrictions on group and prepaid legal services and it suggested reconsideration of the prohibition on advertising by attorneys. *Report of the Chicago Council of Lawyers on the Code of Professional Responsibility*, In the Matter of the Adoption of the Code of Professional Responsibility, Ill. Sup. Ct. No. MR 1353 (October,

1971) [hereinafter cited as "*1971 Council Statement*"]. The Illinois Supreme Court subsequently declined to adopt the ABA Code citing its concern about the provisions restricting group and prepaid legal services.

In 1975 the Council submitted to the ABA a statement urging that the general prohibition on advertising contained in the ABA Code, which is substantially the same prohibition upheld by the Arizona Supreme Court in this case, be eliminated. *Chicago Council of Lawyers Statement on Advertising by Attorneys*, Submitted to the ABA Standing Committee on Ethics and Professional Responsibility (November, 1975) [hereinafter cited as "*1975 Council Statement*"]. The Council's statement set forth our own proposed Rule, a copy of which is attached hereto as Appendix A, to replace the present provisions of the Code. In December, 1975, the ABA Standing Committee on Ethics and Professional Responsibility circulated as a "discussion draft" proposed amendments to the Code which would permit legal advertising along lines comparable to the Council's proposal. However, those "discussion draft" amendments have not been adopted by the ABA House of Delegates, and the only change since made in the ABA Code has been an amendment to permit certain additional information (including the amount of a lawyer's initial consultation charge) to be included in law lists and legal directories and in the classified sections of telephone directories (although such classified sections generally refuse to allow inclusion of any price information).

The Council is currently engaged, with the support of the ABA and with financing from several major foundations, in the development of an experimental legal clinic designed to provide a model for the efficient delivery of legal services to middle-income persons. The operation of the clinic will make heavy use of paralegals, questionnaires,

and mechanical word processing devices. It will also entail a model advertising program in order to generate the volume of routine legal matters necessary to support economical operation of the clinic. *South Shore Experimental Legal Services Program Proposal*, Submitted by the Chicago Council of Lawyers to the ABA Special Committee on the Delivery of Legal Services (March, 1976).

The Council has also had an interest in the application of the First Amendment to other restrictions on the free speech of lawyers. In recently-concluded Federal court litigation, the Council successfully challenged as violative of the First Amendment certain rules of the Federal District Court for the Northern District of Illinois, incorporating in part provisions of the ABA Code, restricting public comments by lawyers on pending civil and criminal cases. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3756 (1976).

A state-enforced prohibition on advertising by lawyers would prevent the members of a bar association such as the Council from acting in accordance with their own considered judgment that such advertising, subject to appropriate limitations, would be beneficial to the profession and to the public. While Illinois currently has no such formal legal prohibition, in view of the Illinois Supreme Court's refusal to adopt the ABA Code, the enactment of such a prohibition remains a possibility and has been urged upon the Illinois Supreme Court by other Illinois bar associations. The Council and its members, therefore, have an important interest in the outcome of this case.

## ARGUMENT

**A state-enforced prohibition on advertising by lawyers is not supported by any compelling state interest; on the contrary, advertising by lawyers would be beneficial to the public and the legal profession and is, at a minimum, a matter about which lawyers and associations of lawyers have a constitutional right under the First Amendment to exercise and act upon their independent judgments.**

The Council believes that advertising by lawyers would be beneficial to the public and would assist the profession to fulfill its basic mandate to make legal services available to all persons who need them. We base this belief on our perception of the need for much greater public awareness of the availability and costs of legal services and our conclusion that only commercial advertising by lawyers offers a realistic prospect of meeting that need.

In urging that the ABA eliminate the Code prohibition on legal advertising, the Council has stated:

"[T]here is a substantial need for more public information about the availability of legal services. In a large metropolitan area such as Chicago, for example, most people have little or no direct contact with lawyers. When people think that they may have legal problems, they generally have no way to know whether legal services are available at a cost they can afford. Further, they generally have no way to compare the services and fees which different lawyers may offer. The effect of this lack of information is to deter many persons from seeking legal help altogether and to make an intelligent choice of an attorney difficult or impossible in individual cases. From an overall point of view, the effect is to minimize effective competition among lawyers and a further consequence may be to inhibit the development of low-cost delivery methods which are dependent upon economies of scale achiev-



able only when a sufficiently large number of clients are aware and able to take advantage of available legal services." 1975 Council Statement at pp. 2-3.

A recent survey found that 80% of the public agreed that "a lot of people do not go to lawyers because they have no way of knowing which lawyer is competent to handle their particular problem." B. Curran & F. Spalding, *The Legal Needs of the Public* at p. 95. (Am. B. Found. 1974). Our own association office receives dozens of calls daily from persons in the Chicago area seeking information about where to get legal help.

There is no realistic method in prospect, apart from advertising by lawyers, to meet the foregoing need. Lawyer referral services are presently utilized by a bare fraction of the population (see B. Curran & F. Spalding, *supra*, at p. 89), and such services are a cumbersome and unfamiliar method of imparting information which is unlikely ever to be widely accepted by the public. Lists or directories of lawyers may be a useful supplement to advertising, but they are currently even more limited in access than referral services and they are similarly unlikely ever to reach the desired mass audience. Further, as the Council knows from its own experience in attempting to devise an effective lawyer referral service and to develop plans for a legal directory, efforts of that kind on a large scale require large-scale funding which is not generally available. Even if one were otherwise inclined to believe in the potential efficacy of such alternative measures, there is no basis for confidence that the required commitment to the wide availability of legal services will be forthcoming from a profession which until very recently was generally engaged in "attempt[ing] to restrict the extension of group legal services as far as constitutionally permissible." 1971 Council State-

ment at pp. 15-16 (commenting on ABA Code provisions which were not significantly liberalized until 1975). Unlike such alternative ways of providing information to the public, advertising by lawyers allows the individual service providers themselves to bear the cost, with the major and immediate economic incentive of obtaining legal business by doing so.

The question before this Court, of course, is not whether, as a matter of policy, the Council and others are correct in believing that lawyer advertising would generally be beneficial to the legal profession and the public. Rather, the question in the present case is whether lawyers, individually or through bar associations such as the Council, have the right to make such judgments and to act in accordance with their views of what the interests of the profession and the public require, or whether, as the Arizona Supreme Court has held, a state may deny such freedom by imposing and enforcing through state authority a virtually absolute prohibition on lawyer advertising of the type embodied in the current ABA Code. This Court has now held in *Bigelow v. Virginia*, 421 U.S. 809 (1975), and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 96 S. Ct. 1817 (1976), that commercial speech, such as advertising, is not excluded from the protections of the First Amendment. The rationale of those cases applies with particular force to advertising which entails the communication of information about the price and other aspects of the availability of legal services—information which may well be a practical prerequisite to the assertion by many members of the public of constitutional and all other legal rights.

Once this Court determined that First Amendment protections extend to advertising, a restriction on such pro-

tected freedom of expression became constitutionally justifiable only if supported by a "compelling state interest." See, e.g., *NAACP v. Button*, 371 U.S. 415, 438 (1971). In other cases dealing with the availability of legal services, this Court has refused to uphold restrictions on First Amendment freedoms based on alleged dangers which are merely speculative or "conceivable" in nature. See, e.g., *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 127, 223-24 (1967). Further, this Court has held that any restriction on First Amendment freedoms "must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Procunier v. Martinez*, 416 U.S. 396, 413 (1974).<sup>\*</sup> Under these well-established First Amendment principles, a state-enforced ban on virtually all legal advertising cannot withstand constitutional scrutiny.

All of the dangers which are alleged to flow from advertising by lawyers, assuming (although this Court need not now decide) that they are sufficient to warrant any form of state-enforced prohibition, may be met by more specific restrictions. The Council's proposed Rule (attached hereto as Appendix A) is an example of a rule that attempts to deal specifically with those practices that the state may have a substantial governmental interest in preventing. Section (A) of that Rule is divided into three subsections which (1) specify the types of information to be permitted in advertising by lawyers, (2) prohibit any false or misleading statement as well as certain other specific types of

<sup>\*</sup> For a specific application of these principles to restrictions on free speech by lawyers, see *Chicago Council of Lawyers v. Bauer*, *supra*, in which the Seventh Circuit determined that restrictions on public comment by lawyers on pending cases, as set forth in District Court rules and the ABA Code, were over-broad and violative of the First Amendment.

statements, and (3) set a general standard regarding the manner of presentation of information. Subsection (1)(d) specifically allows inclusion in advertising by lawyers of the hourly rates or other basis on which a lawyer's fee will be determined:

"We recognize that the disclosure of hourly rates may often be only partially adequate to allow a potential client to determine the likely costs of legal services. Without permitting the disclosure of fees, however, advertising by lawyers will clearly fail to deal with the most serious existing problems and we do not think that the imperfections of such disclosure represent an excuse for maintaining the present widespread ignorance." *1975 Council Statement* at p. 6.

The Council does not assert that its own proposed Rule on legal advertising is necessarily the perfect resolution of the various possible concerns about such activity. We do strongly assert, however, that only such a narrowly-drafted restriction, directed toward specific and defined dangers, may conceivably withstand constitutional scrutiny when enforced by state authority. The virtually absolute bar on advertising set forth in the ABA Code and upheld by the Arizona Supreme Court, in contrast, is no resolution at all. That simplistic prohibition cannot, we submit, be imposed by a state upon individual lawyers or associations of lawyers who conclude that legal advertising is desirable and in the public interest and who propose to exercise their freedom under the First Amendment to act upon that judgment.

**CONCLUSION**

For the foregoing reasons, the Chicago Council of Lawyers respectfully urges that the judgment of the Arizona Supreme Court be reversed.

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**APPENDIX A**

**CHICAGO COUNCIL OF LAWYERS DRAFT  
PROPOSED RULE ON ADVERTISING  
(TO REPLACE PRESENT RULES  
DR 2-101 (A)-(B) AND 2-102 (A))**

*DR 2-101, Publicity and Advertising.*

(A) A lawyer shall not publicize him/herself as a lawyer through any commercial publicity or other form of public communication (including, without limitation, any newspaper, magazine, telephone directory, radio, television or other advertising) unless such communication meets all three of the following conditions:

- (1) Such communication shall be limited to one or more of the following types of information:
  - (a) the name of the lawyer;
  - (b) the lawyer's address and telephone number;
  - (c) the educational and other background of the lawyer (including, without limitation, date and place of birth; date and place of admission to the bar of state and federal courts; schools attended with dates of graduation, degrees and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; and memberships in scientific, technical and professional associations and societies);
  - (d) the hourly rates or other basis on which the lawyer's fees are determined (any disclosure of hourly rates to include a statement to the effect that total time spent may depend on various factors, including the ability and experience of the lawyer);
  - (e) a description of the types of legal matters in which the lawyer will accept employment;
  - (f) the lawyer's foreign language ability;



## **A-2**

- (g) the names and addresses of references and, with their consent, names of clients regularly represented; and
- (h) other information about the lawyer, the lawyer's practice, or the types of legal matters in which the lawyer will accept employment, which a reasonable person might regard as relevant in determining whether to seek the lawyer's services.

As used herein, references to a "lawyer" shall also permit inclusion of information as to the lawyer's law firm and the lawyer's partners or associates.

(2) Such communication shall not contain any statement which constitutes dishonesty, fraud, deceit or misrepresentation by the lawyer. Further, and without limitation on the foregoing, such communication shall not:

- (a) contain any estimate, promise or prediction of the result of any future legal proceeding or proceedings;
- (b) contain any statement of the results of any prior or pending legal proceeding or proceedings;
- (c) be communicated in such a manner that a reasonable person might not understand that it constitutes publicity by the lawyer; or
- (d) make any comparative statement regarding any other lawyer.

(3) The form of such communication shall be designed to communicate the information contained therein to the public in a direct and readily comprehensible manner.

(B) A lawyer may provide information in a communication which meets the conditions of DR 2-101 (A) (1) and (2) in response to a request for such information from any organization or group, including, without limitation, any such request from an organization or group which proposes to communicate such information to its members or the public at large.

No. 76-316

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

JOHN R. BATES AND VAN O'STEEN, *Appellants*

v.

STATE BAR OF ARIZONA

On Appeal From the Supreme Court of Arizona

**BRIEF AMICUS CURIAE ON BEHALF OF THE  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

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No. 76-316

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JOHN R. BATES AND VAN O'STEEN, *Appellants*

v.

STATE BAR OF ARIZONA

---

On Appeal From the Supreme Court of Arizona

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**BRIEF AMICUS CURIAE ON BEHALF OF THE  
AMERICAN OPTOMETRIC ASSOCIATION  
URGING AFFIRMANCE \***

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**INTEREST OF THE AMERICAN OPTOMETRIC  
ASSOCIATION**

The American Optometric Association, a non-profit membership organization incorporated in Ohio, is a national professional association of more than 19,000 members consisting of licensed Doctors of Optometry, optometry students and educators. The Association's objects, as set forth in its Constitution, are "to improve the vision care and health of the public and to pro-

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\* Pursuant to Rule 42(2) we have lodged with the Clerk the written consents of the parties to our filing a Brief Amicus Curiae.

mote the art and science of the profession of optometry”.

The Doctor of Optometry (O.D.) is a primary provider of vital health services who examines, diagnoses and treats conditions of the vision system. He is specifically educated,<sup>1</sup> trained and licensed to examine the eyes and related structures to determine the presence of vision problems, eye diseases or other abnormalities. Where appropriate, the optometrist prescribes and may dispense and adapt lenses or other optical aids and may use vision training or other methods of treatment to improve, preserve or restore maximum visual efficiency.

As the national professional organization representing the optometric profession, the American Optometric Association has been, and is, deeply interested not only in legislation which seeks to improve the practice and standards of the profession itself, but also in regulations and legislation intended to assure to the public the availability of competent vision care and quality ophthalmic materials and to protect the public against deception and improper practices. Questions as to permissibility of advertising of professional vision care services, and of advertising the fees to be charged therefor, have played an important role in the regulatory systems developed by a very large proportion of States. Answers by the legislative and regulatory bodies have varied from one State to an-

<sup>1</sup> Today's optometric curriculum requires the completion of a four-year program at one of the nation's thirteen State or private colleges of optometry, in addition to a minimum of two years (several institutions require three years) of prior undergraduate college study. Most students presently entering colleges of optometry have a bachelor's degree.

other—depending upon the particular State's assessment of its own local conditions and of how the balance should best be struck for the benefit of its citizens. This has, however, been a matter of State law, in the light of the actual conditions prevailing there.

The American Optometric Association is directly concerned, from a national perspective, with important litigation involving traditional State regulation of professional services. Accordingly, the American Optometric Association and its members have a substantial interest in the federal questions presented to the Court in this case.

#### SUMMARY OF ARGUMENT

There is no merit in Appellants' claim that the First Amendment overrides the long-exercised power of the States to prohibit attorneys from running paid advertisements in the newspapers to advertise their professional services and the fees they wish to charge. The “commercial speech” doctrine is by no means unlimited. From the decisions of this Court in a wide variety of contexts, it is manifest that the First Amendment does not immunize “commercial speech” against legitimate governmental regulation or prohibition.

Advertising by lawyers is a close analog to advertising by physicians, optometrists and other professionals in the field of health care services—a field where successive decisions of this Court have sustained the broad constitutional power of the States each to determine for itself whether, in the particular State and in the light of its own experience, the public interest will best be served if such advertising is prohibited or regulated. The rendering of professional services by



lawyers and doctors involves a unique relationship of trust with the client or patient; and individualized professional services involving the exercise of professional judgment and discretion must be furnished with a special commitment to the welfare of the client or patient which transcends the responsibilities present in a normal commercial transaction. On grounds such as these, the reasoning of the Court in last Term's *Virginia State Board of Pharmacy* decision, 96 S.Ct. 1817—which invalidated a State prohibition against price advertising by retail druggists of the prices of the standardized and largely pre-packaged prescription drugs which they sell—is totally inapplicable here.

The claim which Appellants' assert under the federal antitrust laws is wholly without merit, but we rely on the Appellee's Brief for the detailed development of the responsive argument on this point.

Since the Appellants' federal claims should all be rejected, the Arizona Supreme Court's judgment should be affirmed, thus leaving it to the people of Arizona to decide, in the light of their own changing local situation, whether, and if so under what conditions, lawyers in Arizona should be permitted to advertise their professional services.

#### ARGUMENT

It is the position of the American Optometric Association that the federal claims being asserted by the Appellants under the First Amendment and under the antitrust laws are without merit and should be rejected. Accordingly, the Arizona Supreme Court's judgment should be affirmed, thus leaving it to the people of Arizona to decide—from time to time and in the light of their own local situation—whether, and if so under what conditions, lawyers in Arizona should be

permitted to advertise the professional services they wish to furnish and the fees they wish to charge for such professional services.

#### I. The First Amendment Does Not Oust the State of Its Power To Prohibit This Advertising by Lawyers of Their Professional Services and Fees

We start with full recognition that in recent years this Court has, as part of the process of balancing important interests, developed a doctrine that "commercial speech" is to be afforded a certain degree of protection under the First Amendment. *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 96 S.Ct. 1817 (1976). We say a "certain degree" of protection because it must be evident that in developing the doctrine this Court has not intended to overrule long lines of decisions whereby this Court has adjudicated, in many different areas, that the government (be it Federal or State) does clearly have the power to impose prohibitions and regulations on various forms of "commercial speech."

These lines of decisions—including some of very recent vintage—show that, in a wide variety of contexts, the First Amendment does not immunize "commercial speech" against legitimate governmental regulation or prohibition, even apart from the recognized "time, place and manner" restrictions. We refer, for example, to *Associated Press v. United States*, 326 U.S. 1 (1945) (prohibiting antitrust violations); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (same); *Donaldson v. Read Magazine*, 333 U.S. 178, 192 (1948) (prohibition against using mails for fraudulent advertising); *Pittsburgh Press v. Human Relations Commission*, 413 U.S. 376 (1973) (prohibit-

ing unlawful help-wanted advertisements based on sex discrimination); *United States v. Reidel*, 402 U.S. 351 (1971) (prohibition against business of selling obscene materials through the mails); *Hamling v. United States*, 418 U.S. 87 (1974) (same); *California v. LaRue*, 409 U.S. 109 (1972) (prohibition against certain types of entertainment in places where liquor is sold); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (prohibition of showing of obscene motion picture films in theater).

For further illustrations we refer to decisions such as *N.L.R.B. v. Virginia Electric & P. Co.*, 314 U.S. 469 (1941) (prohibiting coercive management speeches as unfair labor practice); *Capital Broadcasting Company v. Acting Attorney General and National Association of Broadcasters v. Acting Attorney General*, 405 U.S. 1000 (1971), affirming *Capital Broadcasting Company v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971) (prohibition of cigarette advertising on radio and television); *Erlenbaugh v. United States*, 409 U.S. 239 (1972) (prohibition against circulating racing "scratch sheet" via a facility of interstate commerce); *Mourning v. Family Publications Service*, 411 U.S. 356 (1973) (prohibition of "dunning" letters violating Truth in Lending Act); *United States v. Walsh*, 331 U.S. 432 (1947) (prohibition of false guaranty violating Federal Food, Drug and Cosmetic Act); *Seven Cases v. United States*, 239 U.S. 510 (1916) (prohibition of misleading circulars making drugs misbranded).

Last term in *Virginia State Board of Pharmacy, supra*, this Court held that the First Amendment invalidates a State statute prohibiting price advertising by retail pharmacists—that is, advertising of the standardized and largely pre-packaged prescription drugs

which they sell. The opinion went out of its way to make clear that the Court was not there deciding the questions which come here now from Arizona. As the Court stated, 96 S.Ct. at 1831 note 25:

"Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising."

In similar vein was the Chief Justice's concurring opinion, 96 S.Ct. at 1831-1832:

"Our decision today, therefore, deals largely with the State's power to prohibit pharmacists from advertising the retail price of prepackaged drugs. As the Court notes, . . . quite different factors would govern were we faced with a law regulating or even prohibiting advertising by the traditional learned professions of medicine or law. 'The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and historically been 'officers of the courts.' " [Citations omitted]. We have also recognized the State's substantial interest in regulating physicians. [Citations omitted]. Attorneys and physicians are engaged primarily in providing services in which professional judgment is a large component, a matter very different from the retail sale of labeled drugs already prepared by others."



A decision by this Court relating to the State's power to prohibit or regulate advertising by lawyers will almost certainly have important implications for the power of the States to prohibit or regulate advertising in the field of professional health care services. In the overwhelming majority of the States, price advertising of optometric services is regulated by State statutes or by regulations adopted by States agencies. In many of those States there exists a strong body of opinion, supported by prior experience with actual abuses, that such advertising leads to results which are highly detrimental to the consuming public.

As this Court has expressly recognized, such statutes were enacted not to advance the economic well-being of any profession, but to protect the public health and welfare. *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 428 note 4 (1963); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955); *Wall v. Hardwick*, No. 74-194, 419 U.S. 888 (1974); *Roschen v. Ward*, 279 U.S. 337 (1929); *Carp v. Texas State Board of Examiners in Optometry*, 389 U.S. 52 (1967); see also *Semler v. Dental Examiners*, 294 U.S. 608 (1935); *Barsky v. Board of Regents*, 347 U.S. 442 (1954); *Toole v. State Board of Dentistry*, 316 U.S. 648 (1942).

Such State laws have been in existence for many years. They have been upheld not only by this Court in the decisions just cited, but also by numerous decisions in other State court proceedings.<sup>2</sup>

<sup>2</sup> E.g., *Louisiana State Board of Optometry Examiners v. Pearle Optical*, 248 La. 1062, 184 So. 2d 10 (1966); *Economy Optical Co., v. Kentucky Board of Optometric Examiners*, 310 S.W.2d 783 (Ky. 1958); *Ullom v. Boehm*, 392 Pa. 643, 142 A.2d 19 (1958); *Norwood v. Paranteau*, 75 S.D. 303, 63 N.W.2d 807 (1954);

In *Williamson* this Court sustained the constitutional validity of such a State statute as applied to the advertising of the sale of frames by opticians, holding that the statute did not violate the Due Process or Equal Protection Clauses of the Constitution. There the Court said (348 U.S. at 490):

"An eyeglass frame, considered in isolation, is only a piece of merchandise. But an eyeglass frame is not used in isolation, as Judge Murrah said in his dissent below; it is used with lenses; and lenses, pertaining as they do to the human eye, enter the field of health. . . . We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers."

In *Head*, this Court upheld New Mexico's statutory prohibition against price advertising of eyeglasses. In ruling that this did not violate the Due Process or Commerce Clauses of the Constitution, the Court said (374 U.S. at 428-429):

"the statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power. The legitimacy of state legislation in this precise area has been expressly established.

*Klein v. Department of Registration and Education*, 412 Ill. 75, 105 N.E.2d 758 (1952), *certiorari denied*, 344 U.S. 855 (1952); *Ritholz v. Commonwealth*, 184 Va. 339, 35 S.E.2d 210 (1945); *Melton v. Carter*, 204 Ark. 595, 164 S.W.2d 453 (1942); *Commonwealth v. Ferris*, 305 Mass. 233, 25 N.E.2d 378 (1940); *Bennett v. Indiana State Board of Registration and Examination in Optometry*, 211 Ind. 678, 7 N.E.2d 977 (1937); *Seifert v. Buhl Optical Co.*, 276 Mich. 692, 268 N.W. 784 (1936); *Texas Optometry Board v. Lee Vision Center, Inc.*, 515 S.W.2d 380 (Tex.Ct.of App. 1974).



*Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483.”

The Court also held that the statute did not violate the privileges and immunities of national citizenship, and that it was not preempted by the Federal Communications Act, stating that “we cannot believe Congress has ousted the States from an area of such fundamentally local concern” (374 U.S. at 432). A contention that there was an invalid restraint on freedom of speech protected by the Fourteenth Amendment was not expressly considered because it had not been properly presented (374 U.S. at 432 note 12); but from the tenor of the opinion it can hardly be doubted that if any such contention had been properly presented it would have been firmly rejected.

Thus the prior decisions of this Court involving optometry statutes have consistently upheld their constitutional validity. As *Head* recognized (374 U.S. at 426), the purpose of such legislation has been to “‘protect . . . citizens against the evils of price advertising methods tending to satisfy the needs of their pocket-books rather than the remedial requirements of their eyes.’”

In *Bigelow v. Virginia, supra*, this Court said (421 U.S. at 825 note 10):

“We have no occasion, therefore, to comment on decisions of lower courts concerning regulation of advertising in readily distinguishable fact situations. . . . In those cases there usually existed a clear relationship between the advertising in question and an activity that the government was legitimately regulating. . . .

\* \* \* \* \*

“Our decision also is in no way inconsistent with our holdings in the Fourteenth Amendment

cases that concern the regulation of professional activity. See *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156 (1973); *Head v. New Mexico Board*, 374 U.S. 424 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Barsky v. Board of Regents*, 347 U.S. 442 (1954); *Semler v. Dental Examiners*, 294 U.S. 608 (1935).”<sup>3</sup>

Long history and extensive experience have established that the furnishing of vision care and prescription eyeglasses—which are provided specially to meet the particular vision needs of the individual patient and involve the exercise of professional judgment and discretion—is in the context of rendering individualized health services furnished by eye-care providers.<sup>4</sup> These

<sup>3</sup> In addition to these references in the *Bigelow* opinion and to the comparable references in the *Virginia State Board of Pharmacy* opinion, 96 S. Ct. at 1829, it should be noted that this Court has also referred to *Williamson* and *Head* with approval in other recent decisions such as *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156, 167 (1973); *California v. LaRue*, 409 U.S. 109, 116 (1972); *Geduldig v. Aiello*, 417 U.S. 484, 495 (1974); *Miller v. California*, 413 U.S. 15, 32 note 13 (1973); *Kelley v. Johnson*, 425 U.S. 238, 248 (1976).

<sup>4</sup> The numerous procedures and tests which may be performed by an optometrist are discussed in the more than 1200 page textbook *Clinical Refraction* (3rd ed. 1970), by Irvin Borish, Professor of Optometry at Indiana University. From the hundreds of productive tests which may be utilized, the doctor must select the battery of procedures needed to diagnose and treat each patient's particular visual condition. Not only is there a legion of procedures for adults, but Ames, Gillespie and Streff of the Gesell Institute of Child Development state that “A thorough eye and vision abilities examination of a child should take from forty-five minutes to one and a half hours of testing and conference time. This examination should include (1) an evaluation of the child's eyes and eye health; (2) an evaluation of the flexibility and skills of eye and vision changes; and (3) an evaluation of efficiency in using vision to obtain and utilize information.” Ames, Gillespie and Streff, *Stop School Failure*, p. 122 (1972).

professional services are activities which—as this Court's decisions have established time and time again—are subject to extensive regulation by the State in order to protect the public interest. A State which determines, in the light of its own experience, that, on balance, the public will be best served if the providers of such services are prohibited from advertising their fees is exercising a legislative judgment which, by wise tradition, is well within its powers. In this respect the vision care and other precedents in the professional health services field furnish a close analog which here supports the power of Arizona to prohibit lawyers from running advertisements in the newspaper concerning the fees they wish to charge.

In view of the Appellants' claimed reliance (Brief, pp. 37-42) on decisions such as *NAACP v. Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar*, 389 U.S. 217 (1967), it is worth noting that nothing in the case now before the Court involves any restriction on the right of any association or union to make arrangements for the furnishing of group legal services to its members or to inform its members as to what their costs are likely to be if and when they avail themselves of such services. Nor does the case involve any restriction on the right of any association or union to recommend to its members any one or more attorneys, or to advise its members what the probable costs of such attorneys' services might be. What this case does involve is Arizona's power to prohibit the attorneys themselves from placing in the newspapers certain paid advertisements concerning themselves, their services and their fees. While the desirability of a total prohibition on such self-advertising by lawyers may be open to de-

bate, the debate is within the orbit of a State's power to resolve one way or the other without finding itself in collision with the First Amendment.

A word should be added concerning the fact that the Appellants' Brief (pp. 11-13) makes some extravagant claims as to asserted beneficial effects of price advertising in reducing prices. In the course of doing so, Appellants rely on certain asserted data concerning the price of eyeglasses. Apart from the fact that such possible economic considerations would in any event not be controlling here, it should be noted, first, that no findings were made by the Arizona Supreme Court concerning these matters; and second, that the sensitivity of price to advertising in the field of ophthalmic goods and services is very much in issue in a pending Federal Trade Commission rulemaking proceeding (noticed in the Federal Register for January 16, 1976; 41 F.R. 2399), where the record also includes extensive evidence contradictory to what is being relied on by Appellants here. For example, San Francisco Consumer Action, a consumer organization, conducted a study of prices for ophthalmic goods and services and concluded, among other things, (i) that there has not been any apparent increase in price competition or any disappearance of price dispersion where price advertising is permitted, and (ii) that corporations which do, or might be likely to, price advertise incur other economic and non-economic costs which offset any economies of scale or lowered prices they might otherwise offer. Moreover, in that pending FTC proceeding strong arguments are being made that the record there does not establish that patients would receive any substantial economic benefits from the advertising of ophthalmic goods and services.

## II. Appellants' Claim Under the Federal Antitrust Laws Is Lacking in Substance

We leave to the Appellee the detailed development of the response to the wholly unmeritorious claim which Appellants assert under the federal antitrust laws. But we do wish to note that nothing in this Court's recent decision in *Cantor v. Detroit Edison Co.*, 96 S.Ct. 3110 (1976)—nor indeed in any other decision—lends the slightest semblance of substance to the claim being asserted.

### CONCLUSION

The services provided by lawyers and doctors are of crucial importance to the individual client or patient because they truly affect his very life and well-being, his ability to function in society and to enjoy life. The lawyer or doctor has a unique relationship of trust with his client or patient, and must have a special commitment to the welfare of the client or patient which transcends the responsibilities present in a normal commercial transaction. The proper performance of these services and responsibilities by the professions not only affects the individuals immediately involved, but also may have a direct and substantial impact on the community at large. The State's power to continue to prohibit or to regulate paid advertisements by such professionals is fully justified by the long-standing interpretation of our Constitution and the critical and unique importance of individualized legal services and professional health care services to the persons involved and to society as a whole. In our dynamic federalism, this is not an area from which the States should be ousted.

For the reasons stated, in addition to those being urged by the Appellee, the judgment of the Supreme Court of Arizona should be affirmed.

Respectfully submitted,

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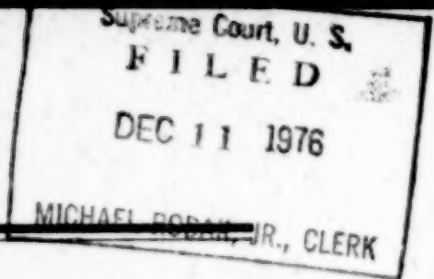
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No. 76-316



**In the Supreme Court of the United States**  
OCTOBER TERM, 1976

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JOHN R. BATES AND VAN O'STEEN, APPELLANTS

v.

STATE BAR OF ARIZONA

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ON APPEAL FROM THE SUPREME COURT OF ARIZONA

---

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

---

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## In the Supreme Court of the United States

OCTOBER TERM, 1976

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 No. 76-316

JOHN R. BATES AND VAN O'STEEN, APPELLANTS

v.

STATE BAR OF ARIZONA

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 ON APPEAL FROM THE SUPREME COURT OF ARIZONA

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 BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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 INTEREST OF THE UNITED STATES

More than six years ago the United States initiated a program of antitrust enforcement directed at restraints of trade in the commercial aspects of various professions and other providers of personal services.<sup>1</sup> The United States has instituted Sherman Act

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<sup>1</sup> See, e.g., McLaren, *Antitrust—The Year Past and The Year Ahead*, 1970 N.Y. State Bar Ass'n Antitrust L. Sym. 15, 23; *An Interview With Richard W. McLaren, Assistant Attorney General, Antitrust Division*, 39 ABA Antitrust L.J. 368, 377 (1970); Hearings on Legal Fees before the Subcommittee on Representation of Citizens Interests of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., Part I, 164-165 (1970).

cases challenging "ethical" restraints upon price competition promulgated by professional associations of lawyers, engineers, architects, accountants, and realtors.<sup>2</sup> Regrettably, however, the prohibition of private price fixing among providers of professional services, see *Goldfarb v. Virginia State Bar*, 421 U.S. 773, will not necessarily provide the public with the benefits of competition. As a practical matter, meaningful competition in the professions is often severely hampered by various "ethical" restrictions on the ability of members of the profession to make known to the public information concerning their prices, their qualifications, or even their existence.

Consequently, the government has instituted a number of proceedings designed to eliminate unnecessary restrictions upon the advertising of professional and other services. The United States has charged that advertising restrictions imposed by the code of ethics of the American Pharmaceutical As-

<sup>2</sup> E.g., *United States v. Prince Georges County Board of Realtors*, Civ. No. 21545, D. Md., terminated by consent decree on December 28, 1970; *United States v. American Society of Civil Engineers*, Civ. No. 72 C 1776, S.D. N.Y., terminated by consent decree on June 1, 1972, CCH 1972 Trade Cas. ¶ 73,950; *United States v. American Institute of Architects*, Civ. No. 992-72, D.D.C., terminated by consent decree on June 19, 1972, CCH 1972 Trade Cas. ¶ 73,981; *United States v. American Institute of Certified Public Accountants, Inc.*, Civ. No. 1091-72, D.D.C., terminated by consent decree on July 6, 1972, CCH 1972 Trade Cas. ¶ 74,007; *United States v. National Society of Professional Engineers*, decided in the government's favor November 26, 1975, 404 F. Supp. 457 (D.D.C.) (bar against competitive bidding); *United States v. Oregon State Bar*, dismissed as moot, October 20, 1975, 405 F. Supp. 1102 (D. Ore.).

sociation violate the Sherman Act.<sup>3</sup> More recently, the United States filed a Sherman Act complaint against the American Bar Association, challenging the advertising restrictions embodied in its Code of Professional Responsibility.<sup>4</sup> The Federal Trade Commission has instituted inquiries or complaint proceedings concerning advertising restrictions relating to prescription drugs,<sup>5</sup> ophthalmic goods and services,<sup>6</sup> the funeral industry,<sup>7</sup> and medical services.<sup>8</sup>

This case presents the question whether a total ban on lawyers' advertising, promulgated and enforced by the Supreme Court of Arizona, is forbidden by the Sherman Act or the First Amendment.<sup>9</sup> These questions implicate important federal enforcement activities. The claim is often made that anti-competitive practices have been approved or mandated by state officials and are consequently exempt from the Sherman Act. Because the United States has primary responsibility for the enforcement of the Sherman Act, it has an interest in ensuring

<sup>3</sup> *United States v. American Pharmaceutical Association*, No. G 75-558-CA5, W.D. Mich., filed November 24, 1975.

<sup>4</sup> *United States v. American Bar Association*, No. 76-C-3475, N.D. Ill., filed June 25, 1976.

<sup>5</sup> 40 Fed. Reg. 24031.

<sup>6</sup> 41 Fed. Reg. 2399.

<sup>7</sup> 40 Fed. Reg. 39901.

<sup>8</sup> *American Medical Association*, F.T.C. Docket No. 9064 (December 19, 1975).

<sup>9</sup> The First Amendment applies to the States through the Fourteenth Amendment. *Bigelow v. Virginia*, 421 U.S. 809, 811; *Schneider v. State*, 308 U.S. 147, 160.

that the state action exemption is not interpreted more broadly than is necessary to protect legitimate decisions, by the States themselves, to substitute regulation for competition.<sup>10</sup> Moreover, if the restrictions challenged here are held not to violate the Sherman Act, the United States has an interest in the resolution of the First Amendment issue both because of its interest in appropriate regulation of deceptive or otherwise harmful advertising and because of the broader interest of ensuring the access of its citizens to the competitively significant nondeceptive information that is essential to the proper functioning of our economy.

#### STATEMENT

Appellants are members of the State Bar of Arizona. Since 1974 they have been engaged in a form of law practice that they call a "legal clinic." Appellants have endeavored to provide inexpensive legal services to persons of low or moderate income. In order to keep their fees low, they have permitted paralegal personnel to perform work commonly performed by attorneys, they have largely confined their practice to types of cases lending themselves to sys-

<sup>10</sup> Different principles may apply under the Federal Trade Commission Act, and we do not suggest that the decision in this case would necessarily govern Federal Trade Commission proceedings. Cf. *Spiegel, Inc. v. Federal Trade Commission*, 540 F.2d 287 (C.A. 7); *Royal Oil Corp. v. Federal Trade Commission*, 262 F.2d 741 (C.A. 4); *Chamber of Commerce v. Federal Trade Commission*, 13 F.2d 673 (C.A. 8).

tematization, and they have accepted a relatively low profit from their services (A. 70-84). Appellants believe that, if their "legal clinic" is to be successful, it must attract large numbers of clients; this cannot be accomplished without widespread dissemination of information about the clinic to potential customers (A. 122-131).

In order to achieve the volume of business that they believe is necessary, appellants placed, in a daily newspaper of general circulation in the Phoenix area, an advertisement notifying the public of the existence of their law office and stating their fees for certain services (A. 409). During the six weeks following the placement of the advertisement, appellants attracted new clients at a rate greater than before (A. 235-236, 479).

The State Bar of Arizona charged appellants with violating Disciplinary Rule 2-101(B), of Rule 29(a) of the Supreme Court of Arizona, 17A Ariz. Rev. Stat. Ann. (Cum. Supp. 1975), which prohibits attorneys from advertising, in any way, in newspapers of general circulation (A. 6-7).<sup>11</sup> Appellants

<sup>11</sup> Disciplinary Rule 2-101(B) proscribes any "commercial" advertising by attorneys. It provides (emphasis added):

*A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertising in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf. However, a lawyer recommended by, paid by, or whose legal services are*



admitted that their advertisement violated the Rule, but they argued that the Rule is invalid under the First Amendment to the United States Constitution and under the state and federal antitrust laws (A. 8-12). Following a hearing, a Special Local Administrative Committee of the State Bar concluded that appellants had violated the Rule. It recommended that both be suspended from the practice of law for not less than six months (A. 481-483).

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furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits. This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

- (1) In political advertisements when his professional status is germane to the political campaign or to a political issue.
- (2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.
- (3) In routine reports and announcements of a bona fide business, civic, professional or political organization in which he serves as a director or officer.
- (4) In and on legal documents prepared by him.
- (5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.
- (6) In communications by a qualified legal assistance organization, along with the biographical information permitted under DR 2-102 (A) (6), directed to a member or beneficiary of such organization.

Appellants sought review by the Board of Governors of the State Bar, pursuant to Rule 36 of the Supreme Court of Arizona, 17A Ariz. Rev. Stat. Ann. (Cum. Supp. 1975). The Board agreed with the Committee that appellants had violated the Rule, but it reduced the recommended penalty to one week's suspension for each appellant (A. 485-487).

The Supreme Court of Arizona affirmed (J.S. App. 1a-17a). The court concluded, without reference to the competitive effects of the Rule, that it does not violate the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1 and 2, because it does not explicitly fix prices (J.S. App. 4a). It also held that regulation of the bar "is an activity of the State of Arizona acting as sovereign and exempt by the very provisions of the Sherman Act" (*id.* at 5a).

The court concluded, moreover, that state restrictions imposed on advertising by attorneys are immune from scrutiny under the First Amendment. It did not offer any justification for the ban on advertising in the public media; it did not suggest that some less sweeping regulation of advertising would not as well serve the State's purposes. It held, instead, that "[r]estrictions on professional activity, and in particular advertising" (*id.* at 5a), need not be subjected to the scrutiny ordinarily applied to restrictions on speech. It wrote that because "[t]he legal profession, like the medical profession, has always prohibited advertising since it is a form of sollicita-

tion deemed contrary to the best interests of society" (*id.* at 6a), there was no need for further inquiry.<sup>12</sup>

The court censured appellants but did not suspend them from practice (J.S. App. 11a). One Justice concurred in the result (*id.* at 11a-12a); one Justice dissented, arguing that the penalty selected by the majority is too mild (*id.* at 13a); and one Justice dissented because, in his view, the Rule violates the First Amendment (*id.* at 13a-17a).

## SUMMARY OF ARGUMENT

### I

The Sherman Act is designed to prevent restrictions upon competition, not merely the direct fixing of prices. Prohibitions upon advertising prevent lawyers from competing in that fashion; they indirectly increase prices and deprive consumers of options. Therefore, even if the special interest in the self-regulation of the legal profession is a sufficient justification for applying a special rule to legitimate restraints that are part of that program of self-regulation, the total ban on advertising still can not survive scrutiny. The serious anticompetitive effects of such a ban outweigh any conceivable benefits.

Although we believe that the ban on attorneys' advertising in the commercial media violates the sub-

<sup>12</sup> The court also concluded that the Rule does not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment and that it is not unconstitutionally vague (J.S. App. 8a-11a). Appellants have not sought review of these holdings.

stantive standards of the antitrust laws, we agree with the Supreme Court of Arizona that it is immune from antitrust challenge under the principles of *Parker v. Brown*, 317 U.S. 341, 350-352. *Parker* and the cases that follow it teach that a deliberate decision by the State to substitute some form of regulation for the forces of competition, and the necessary actions of private persons compelled by the State's directive, are beyond the scope of the Sherman Act. We submit that the restraint challenged in this case meets that standard.

The Supreme Court of Arizona promulgated the challenged restraint. It did so with full authority to speak for the State; the Supreme Court of Arizona possesses both the legislative and the judicial powers of Arizona with respect to the legal profession. The rule adopted by Arizona is of statewide applicability and is cast in imperative form: no attorney may advertise in any way in the commercial media. It reflects a deliberate policy of the State to substitute regulation for competition. That is enough, under *Parker*, to show that the Sherman Act does not reach the restriction in question here.

### II

Appellants have been punished for placing an advertisement in a newspaper, a form of "pure speech." They were not entitled to defend against the charges by showing that the statements in the advertisement were true and not deceptive. The state court thought that it was enough that appellants had identified



themselves to the public as lawyers. We submit that the State's prohibition is unnecessarily broad.

*Bigelow v. Virginia*, 421 U.S. 809, and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, No. 74-895, decided May 24, 1976, hold that commercial advertisements are protected by the First Amendment. Advertisements by attorneys also are speech within the meaning of the First Amendment. The free flow of information about legal services is no less important than the free flow of information about abortion referral services (as in *Bigelow*) or the prices of prescription drugs (as in *Virginia Pharmacy*).

The applicability of the First Amendment to advertisements by lawyers does not mean that a State is powerless to deal with misleading or deceptive advertisements by lawyers. A State may ensure "that the stream of commercial information flows cleanly as well as freely" (*Virginia Pharmacy, supra*, slip op. 24). But Arizona has not advanced any reason to believe that *all* advertisements concerning legal services are deceptive or misleading. A claim that some legal services are "better" than others might be misleading because of the difficulty of comparing the quality of attorneys' performance; no such claim of professional superiority is involved here, however, and the Arizona ban is not so limited. Factual material such as the name, address, and foreign language ability of an attorney is of obvious interest to consumers, yet it is not likely to mislead or deceive. The

other justifications for restrictions upon the advertising of professional services also fall short of supporting a flat ban on advertising in the commercial media. Because of the breadth of the Arizona ban, and because the Arizona court did not articulate any reasons for its breadth, this case does not require the Court to decide whether some more specific prohibition would be constitutional.

## ARGUMENT

### I

#### THE RESTRAINT UPON ATTORNEY ADVERTISING IMPOSED BY THE SUPREME COURT OF ARIZONA IS NOT SUBJECT TO ATTACK UNDER THE SHERMAN ACT

The Supreme Court of Arizona held both (1) that its restrictions upon advertising by attorneys do not violate the Sherman Act because they do not directly fix prices and (2) that any violations are immune from scrutiny because they represent a deliberate state choice to replace competition with regulation. Appellants argue, to the contrary, that the State Bar's conduct is private action violating the Sherman Act. They maintain that the antitrust violation is a defense in the disciplinary proceedings. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173. We submit that the challenged restraint upon advertising violates the substantive standards of the Sherman Act, but that because the restraint is imposed by the State of Arizona it is not subject to the federal statute.



**A. The Ban On Public Advertising Violates The Substantive Standards Of The Antitrust Laws**

"We live in a society where the distribution of legal assistance \* \* \* is generally regulated by the dynamics of private enterprise." *Fuller v. Oregon*, 417 U.S. 40, 53. The provision of legal services is a vast enterprise; in 1973 more than \$9.3 billion was paid for those services.<sup>13</sup> The Court thus held in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 785-788, that, at least in its commercial aspects, the legal profession is subject to the antitrust laws.

The state court's holding that the ban on advertising does not offend the substantive principles of the Sherman Act because it does not directly fix prices is incorrect. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, made it clear that the Sherman Act is designed to prevent restrictions upon competition, not merely the direct fixing of prices. Combinations and conspiracies in restraint of trade can work through clever or indirect devices as well as through direct increases of price or decreases of quantity supplied. Prohibitions upon advertising indirectly increase prices and deprive consumers of options.<sup>14</sup> Any private agreement by competitors to

<sup>13</sup> Statistical Abstract of the United States 387, 770 (1975).

<sup>14</sup> Steven R. Cox, Associate Professor of Economics at Arizona State University, testified (A. 187-188):

Q. BY MR. CANBY: Is it fair to conclude from your examination of these studies and from any other experi-

refrain from advertising therefore would be presumed to have serious anticompetitive effects. The

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ments that you have done that a ban on price advertising in general marketing tends to drive up prices?

A. You are being very cautious. I can be even stronger. The answer definitely is yes.

\* \* \*

Yes, price advertising is pro-competitive and will decrease prices, and conversely, a ban on price advertising will be anticompetitive and will increase prices.

There are very few areas where they are going to get that kind of an agreement among economists, but here's one of them.

Professor Cox's conclusions are supported by three recent studies of the effect of prohibitions on price advertising. See Benham and Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J.L. & Econ. 421 (1975); Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & Econ. 337 (1972); Cady, *Restricted Advertising and Competition, The Case of Retail Drugs* (Exh. 13). Although comparable studies have not been undertaken for legal services, Professor Cox testified that advertising by lawyers could be expected to lead to a reduction in the price lawyers charge for their services (A. 193). He also testified that advertising would improve the quality of legal services (A. 193-194).

This evidence is consistent with economic theory, which explains that an advertising prohibition increases the cost to consumers of discovering the lowest cost seller of acceptable quality; as a result, sellers obtain greater independence in setting prices and lack incentives to price competitively. Also, advertising prohibitions tend to allow individual prices to diverge more widely than usual from the industry average. Even in the professions, where differences in quality of service naturally account for some dispersion of prices, these differences could not create the pervasive price dispersion now experienced. See Stigler, *The Economics of Information*, in *The Organization of Industry* ch. 16 (1968). When price and

Seventh Circuit therefore has held that agreements among competitors not to compete by price advertising are *per se* violations of the Sherman Act. *United States v. Gasoline Retailers Association, Inc.*, 285 F.2d 688.

Even if the special public interest in the self-regulation of the legal profession were deemed a sufficient justification to apply a special rule to restraints imposed as part of a legitimate program of self-regulation, the Rule at issue here still is unreasonable. The serious anticompetitive effects of such a sweeping ban outweigh any conceivable benefits. After a careful study, two economists concluded that a ban on advertising increased the price of optometric services by 25 to 40 percent. Benham and Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J.L. & Econ. 421, 446 (1975). It is fair to assume that the restraint challenged here also has a significant effect on the price of legal services. As we discuss at pages 25-37, *infra*, alternatives less restrictive than Arizona's flat ban on advertising are available; these would serve the legal profession's legitimate ethical need to prohibit false or misleading advertising, or advertising that serves to foment litigation or bring the legal profession into disrepute.

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other information is readily available, searching for appropriate low-cost sellers becomes practical for consumers. Sellers in turn are forced to be more competitive with regard to both price and quality. See Telser, *Advertising and the Consumer*, and Nelson, *The Economic Value of Advertising*, in *Advertising and Society* 25-42, 43-66 (Brozen ed. 1974).

This Court has long recognized that even when there is a legitimate right and interest in self-regulation that restrains competition, the restraint must be no more restrictive than is necessary to achieve its proper objectives. *Silver v. New York Stock Exchange*, 373 U.S. 341, 357. The Arizona restriction on attorneys' advertising fails that test, for Rule 2-101(B) denies to consumers almost all information about the costs and availability of legal services.

#### **B. The Arizona Prohibition Against Lawyer Advertising Reflects A Deliberate State Policy**

Although we agree with appellants that the ban on advertising offends the substantive principles of the antitrust laws, we agree with the Supreme Court of Arizona that this ban on advertising is immune from antitrust challenge under the principles of *Parker v. Brown*, 317 U.S. 341, 350-352.

We take this position with some reluctance. Because private parties often seek shelter from the antitrust laws behind a claim that they have obtained state approval of or acquiescence in their anticompetitive practices, the United States repeatedly has urged that the antitrust immunity accorded to state action be narrowly construed. Thus, in *Goldfarb v. Virginia State Bar*, *supra*, the United States expressed its view that the state action exemption should be invoked only where the challenged conduct was "directed, commanded or imposed by the state legisla-



ture or by a duly authorized arm of the state.”<sup>15</sup> We contended in *Goldfarb* that the actions of the Virginia State Bar in promulgating and enforcing a minimum fee schedule for attorneys constituted private conduct.

Similarly, in *Cantor v. Detroit Edison Co.*, No. 75-122, decided July 6, 1976, the United States took the position that “for private anticompetitive conduct to be state action and therefore immune from the antitrust laws, it must be conduct that the state affirmatively has required as part of a deliberate state regulatory policy or program.”<sup>16</sup> We contended there that a public utility’s practice of selling light bulbs and electricity in a single package, set forth in a tariff filed with and “approved” by the State public utility commission and that State law required the utility to observe, reflected a policy of the utility, rather than a policy mandated by the State.

It continues to be the position of the United States that the state action exemption to the antitrust laws should not be extended to what are principally private actions, merely because of some approval of or participation by state officials or agents in such conduct. To do so would remove a significant amount of commercial activity from the scope of the antitrust laws without a clear determination by Congress that such anticompetitive conduct is permissible, and without an explicit decision by the State that a de-

<sup>15</sup> Brief for the United States as *Amicus Curiae* 36-37.

<sup>16</sup> Brief for the United States as *Amicus Curiae* 9.

parture from the national policy of competition is in the public interest. On the other hand, *Parker v. Brown* and the cases that followed it teach that a deliberate decision by the State to substitute some form of regulation for the forces of free competition, and the necessary actions of private persons compelled by the State’s directive, are beyond the scope of the Sherman Act.” We submit that the restraint challenged in this case meets that standard.

**1. *The Supreme Court of Arizona acts for the State in Promulgating Restrictions Upon Attorneys’ Conduct***

Appellants characterize the challenged advertising restriction as predominantly the product of appellee, a largely private group (Br. 60-66). Appellants point to Disciplinary Rule 2-101(B) as the source of the restraints. That Disciplinary Rule, however, has been adopted as part of Rule 29(a) of the Rules of the Supreme Court of Arizona and enforced with full knowledge of its effects upon competition. The Supreme Court of Arizona, not appellee, promulgated the challenged restraint. Unlike the situation in *Goldfarb*, where the Supreme Court of Virginia merely acknowledged the existence of minimum fee

<sup>17</sup> The State may not frustrate federal antitrust policy by allowing (or even compelling) private individuals to enter into restrictive agreements the substance of which is left to private determination. *Parker v. Brown*, *supra*, 317 U.S. at 351; *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384. In this case, however, the substance of the restriction is itself a choice of the State.



schedules, here the Supreme Court of Arizona has itself promulgated the prohibition on attorney advertising.

When it promulgated Rule 29(a), the Supreme Court of Arizona acted with full authority to speak for the State.<sup>18</sup> The Court is not faced here (as it was in *Goldfarb*) with action by a private body that is a "state agency" only for limited purposes and is comprised of persons having a direct financial interest in the subject matter of the competitive restraint. The Supreme Court of Arizona, none of whose members may practice law during their term on the court,<sup>19</sup> adopted the restriction on advertising pursuant to authority "vested in it by the Constitution of [Arizona] and its inherent power over members of the legal profession as officers of the Court \* \* \*." Rule 27(a) of the Supreme Court of Arizona, 17A Ariz. Rev. Stat. Ann. (1973). The Supreme Court of Arizona is the ultimate body wielding the State's power over the practice of law; that court may preempt any laws passed by the Arizona legislature concerning the practice of law. See, e.g., *In re Bailey*, 30 Ariz. 407, 248 Pac. 29.

<sup>18</sup> This Court need not address here the issue whether immunity from the Sherman Act extends to anticompetitive rules promulgated by a state agency that does not have clear authority to do so under either the agency's enabling legislation or its purposes. See, e.g., *Duke & Co., Inc. v. Foerster*, 521 F.2d 1277, 1280 (C.A. 3); *Allegheny Uniforms v. Howard Uniform Co.*, 384 F. Supp. 460 (W.D. Pa.).

<sup>19</sup> Ariz. Rev. Stat., Constitution, Article 6, Section 28 (Cum. Supp. 1975).

The Supreme Court of Arizona thus possesses both the legislative and the judicial power of Arizona concerning the practice of law. This Court must defer to Arizona's allocation of legislative powers to its Supreme Court. *Scripto, Inc. v. Carson*, 362 U.S. 207, 210. Under these circumstances, a rule promulgated by the Supreme Court of Arizona restricting advertising by attorneys is an official act of the State of Arizona.

**2. *The Supreme Court of Arizona's Active Role in Enforcing the Restriction on Lawyers' Advertising Demonstrates that the Restrictions are State Rather than Private Action***

The role of the Supreme Court of Arizona in creating and enforcing the challenged restraint can hardly be described as neutral or incidental to private action. On the contrary, in addition to promulgating the restraint on advertising, the Supreme Court of Arizona has established the procedures by which appellee must assist it in enforcing the restraints, and it has reserved to itself the final enforcement decision. Appellee's role with respect to the challenged restriction is determined by the state court: appellee helps the court to weed out spurious complaints and to establish an evidentiary record. Appellee acts at the compulsion of the Rules of the Supreme Court of Arizona, and that court retains ultimate authority over the entire process.

When a complaint is received indicating that a member of the bar may be guilty of violating Rule 29(a)'s restrictions upon advertising, Rule 33 re-

quires a local committee of appellee to conduct a preliminary investigation. If a complaint appears to be substantial, Rule 35(a) requires the committee to convene a hearing to consider the matter. If the committee determines that discipline is appropriate, Rule 35(c)(3) requires the committee to forward its findings of fact and recommendations to the Board of Governors of the State Bar. If the attorney desires to contest the committee's findings or recommendations, Rule 36 requires the Board to afford the attorney certain hearing rights and to make its recommendation to the Supreme Court within a specified period. Finally, and most importantly, if the attorney desires to contest the Board's recommendations or findings, Rule 37 provides that the Supreme Court of Arizona shall review the matter. That court is the ultimate trier of fact and law. See, e.g., *In the Matter of Wilson*, 106 Ariz. 34, 470 P.2d 441.

Because the Arizona court is directly responsible for both the promulgation of the rule against advertising and its enforcement, the rule represents state action and not private conduct. Unlike *Cantor*, where the restrictive practice did not reflect a considered policy decision by the State, the decision of the Supreme Court of Arizona to prohibit advertising by attorneys is a uniform rule of statewide applicability. Unlike *Goldfarb*, where the Virginia Supreme Court's ethical codes mentioned minimum fee schedules but did not require either state or local bar associations to adopt them, the decision of the Supreme Court of Arizona is that all attorneys

in the State must conform to the prohibition upon advertising.

Whatever may be the case with other restrictive practices, the combination of direct promulgation and enforcement of the rule by the Supreme Court of Arizona, acting in both a legislative and judicial capacity for the State of Arizona, leads inescapably to the conclusion that both the substance and procedure of the Rule are the product of the State and not subject to the Sherman Act.<sup>20</sup>

## II

### ARIZONA'S TOTAL BAN ON ADVERTISING BY LAWYERS IN THE COMMERCIAL MEDIA VIOLATES THE FIRST AMENDMENT

Appellants have been punished for placing an advertisement in a newspaper, a form of "pure speech." *Buckley v. Valeo*, 424 U.S. 1, 16-23; *Bigelow v. Virginia*, 421 U.S. 809; *New York Times Co. v. Sullivan*, 376 U.S. 254, 266. They have been punished, moreover, for violating a total ban on such advertisements, a ban that closely resembles a "prior restraint" because it prohibits broadly defined categories of speech without respect to whether the speech is harmful in particular cases. Cf. *Nebraska Press*

<sup>20</sup> Because the restriction challenged in this case is at the core of the rule of *Parker v. Brown*, we express no opinion on the question whether other programs formulated or administered by other bodies must yield, under the Supremacy Clause of the Constitution, to the commands of the Sherman Act. Cf. *Cantor, supra*, slip op. 5-8 (Blackmun, J., concurring).



*Association v. Stuart*, No. 75-817, decided June 30, 1976, slip op. 15-18. Appellants were not entitled to defend the charges brought against them by demonstrating that the statements in the advertisement were true. The state court was not required to find—and did not find—that the advertisement was deceptive, misleading, unfair, undignified, or likely to bring the legal profession into disrepute. It was enough, the court held, that the advertisement identified appellants to the general public as lawyers.

The ban on advertising at issue in this case is exceedingly broad. It sweeps within its prohibition all advertising by attorneys that is likely to call their existence to the attention of the general public. We submit that a ban of this scope violates the First Amendment, although a narrower rule calculated to prevent deceptive or unfair advertising would not. Appellants' censure therefore must be set aside, whether or not the antitrust laws provide them a defense.

**A. The First Amendment Protects Advertising By Lawyers In The Commercial Media**

*Bigelow v. Virginia*, 421 U.S. 809, and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, No. 74-895, decided May 24, 1976, hold that commercial advertisements are protected by the First Amendment. These cases make it clear that there is a strong public interest in the free flow of accurate information about commercial services and commercial products, and that

the flow of information cannot be stanchd simply because it has a "commercial" subject matter.

Any suggestion that a different rule applies to the professions overlooks the fact that *Bigelow* itself involved an advertisement (not placed by a physician) describing the availability of abortions, a routine medical service. There is no material difference between legal and medical services that would make the First Amendment applicable to advertisements concerning abortions but not to advertisements concerning uncontested divorces.

It is true that the Court observed in *Virginia Pharmacy, supra*, slip op. 25 n. 25, that "the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." We do not read this, as the Supreme Court of Arizona did, as implying that the First Amendment does not apply at all to advertising by attorneys. It means only that "certain kinds of advertising" by lawyers and physicians may be deceptive and properly may be prohibited.

Such a prohibition would presuppose the applicability of the First Amendment and would reflect only that the State had overcome the presumptive protection accorded to speech with a demonstration that unrestrained advertising likely would be harm-



ful. The Supreme Court of Arizona did not attempt to demonstrate that the advertisement placed by appellants was deceptive; it relied, instead, on a blanket rule against advertising of all sorts. This rule cannot withstand First Amendment scrutiny.

The Court observed in *Virginia Pharmacy, supra*, slip op. 17, that a free flow of commercial information "is indispensable to the proper allocation of resources in a free enterprise system, [and] it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered." This is true about information concerning legal services no less than it is true about information concerning drug prices or the availability of abortions. "In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse" (*Goldfarb, supra*, 421 U.S. at 788). It is therefore a matter of public interest that consumer decisions about legal services be intelligent and well informed.

Unfortunately, however, there is not now sufficient information available to the public concerning legal services. Study upon study, author after author, reveals the gross ignorance of the public with respect to lawyers and legal services. We have set out at length in Appendix A, *infra*, pp. 1a-9a, some of these findings. One of the major causes of this ignorance is doubtless the ban lawyers have imposed upon the dissemination of information about their services, their prices, and even their existence. Such a ban, far more extensive than the ban struck down in

*Virginia Pharmacy*, is fundamentally incompatible with a system of free expression.

**B. Arizona's Restrictions Upon Advertising Are Broader Than Is Justified By The Considerations Supporting Some Restrictions Upon Deceptive Advertising**

Although the United States believes that Arizona's broad prohibition on attorney advertising violates the First Amendment, we do not imply that the States are powerless to deal with misleading or deceptive advertisements by attorneys. We appreciate the special relationship among the State, the legal profession, and the public that has arisen from the attorney's unique status as an "officer of the court." Moreover, we have no doubt that the bar and the courts must carefully scrutinize the profession and its members to ensure that attorneys do not deceive or mislead the public.

All of this, however, does not support a total ban upon advertising in the commercial media. Many considerations of the public interest might support rules that require communications by attorneys to be scrupulously correct and fair, but none supports a complete prohibition. Many services and products are important to the public health and welfare; most services and products are unique in one way or another; most services and products are provided by groups that have a special concern about those services or products, and that have expertise not shared by the public at large. Yet advertising is allowed with respect to almost all services and products. Any

holding that legal services are in a class apart would rest upon a view of legal services not likely to be shared by those outside the legal profession.

This Court has recognized that there is a "fundamental right within the protection of the First Amendment" to engage in "collective activity undertaken to obtain meaningful access to the courts." *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585. See also *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217; *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1; *National Association for the Advancement of Colored People v. Button*, 371 U.S. 415. That right cannot realistically be used by the people unless they are aware of the availability of legal services and believe that they can afford them. As the studies we discuss in App. A, *infra*, pp. 1a-9a, indicate, however, such information is not now widely available.

The cases cited in the preceding paragraph stand for the rule that there is a collective right of access to the courts that overrides restrictions imposed on the practice of law by state regulatory bodies. The rule should be no different when single practitioners, or partnerships such as appellants, seek to publicize their existence.<sup>21</sup> The right to speak, in this regard,

<sup>21</sup> The First Amendment right of collective action to obtain meaningful access to the courts includes elements of three freedoms: speech, assembly and petition. *United Mine Workers of America, District 12 v. Illinois State Bar Association*, *supra*,

is a right of the public to receive valuable information no less than a right of the speaker to transmit it. *Virginia Pharmacy*, *supra*, slip op. 8-9, 15-22.

The Supreme Court of Arizona did not point to any justification for an absolute prohibition on lawyer advertising in the commercial media. It wrote that "[r]estrictions on professional activity, and in particular advertising, have repeatedly survived constitutional challenge" (J.S. App. 5a-6a), but the cases on which it relied<sup>22</sup> did not consider the First Amendment. Justifications sufficient to survive attack on due process or equal protection grounds will not necessarily survive First Amendment challenge. *Virginia Pharmacy*, *supra*, slip op. 20-21. The state court also sought comfort in the fact that "[t]he legal profession, like the medical profession, has always prohibited advertising since it is a form of solicitation deemed contrary to the best interests of society" (J.S. App. 6a). Habit, however, is not an answer to a constitutional argument.

389 U.S. at 221-222. The freedoms of speech and petition do not require joint activity. See Note, *Advertising, Solicitation and the Profession's Duty To Make Legal Counsel Available*, 81 Yale L.J. 1181, 1186 (1972); Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Court and Lawyering Services*, 48 N.Y.U.L. Rev. 595, 628-636 (1973).

<sup>22</sup> *Williamson v. Lee Optical Co.*, 348 U.S. 483; *Barsky v. Board of Regents*, 347 U.S. 442; *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608.



The ban on advertising seems to have originated as a rule of etiquette rather than of ethics. Early English lawyers were wealthy individuals—

who traditionally looked down on all forms of trade and the competitive spirit characteristic thereof. They regarded the law in the same way they did a seat in Parliament—as primarily a form of public service in which the gaining of a livelihood was but an incident. \* \* \*

\* \* \* They were a select fraternity who lived together and met one another every day, both at dinner and in court, on a friendly basis. Obviously this intimacy would have been impossible for men who were continually blowing their professional horns and plotting to steal away one another's clients, and hence looked down on by their colleagues.

Drinker, *Legal Ethics* 210 (1953). The codes and canons of ethics have incorporated this position, branding attempts to encroach upon the professional employment of another lawyer as unethical.<sup>23</sup>

The belief that lawyers are "above" competition, however, is nothing more than a prejudice. It reflects a desire for a peaceful, noncompetitive, friendly existence. But it is hardly a satisfactory answer to a First Amendment argument. The notion that the public interest in competition does not apply to legal services was laid to rest in *Goldfarb v. Virginia State Bar*, *supra*. A nostalgic attachment to the prohibition

<sup>23</sup> Drinker, *Legal Ethics*, *supra*, at 190-191; Canon 7 of the Canons of Ethics (superseded in 1969 by the Code of Professional Responsibility).

on advertising is not sufficient justification for a restriction which is not required by an articulable public interest.<sup>24</sup>

To the extent that certain kinds of advertising by attorneys may be inherently misleading, the proper remedy would be to ban such advertisements, not to prohibit all advertising in the commercial media.<sup>25</sup> For example, the quality of legal services rendered may be impossible to measure, and this may make a claim by one lawyer that he is "better" than another misleading. There is a ready remedy. Such claims can be prohibited without banning all advertising by attorneys.

Nothing about the practice of law makes *every* advertisement by an attorney deceptive or confusing. Lawyers now may place certain information in law lists, which are available in public libraries. See Dis-

<sup>24</sup> See also Christensen, *Lawyers for People of Moderate Means* 102 (1970).

<sup>25</sup> Misleading, deceptive or unfair advertisements unquestionably may be forbidden. See *Virginia Pharmacy*, *supra*, slip op. 23-25 and n. 24; *Young v. American Mini Theatres, Inc.*, No. 75-312, decided June 24, 1976, slip op. 18 and n. 31 (plurality opinion of Stevens, J.). Disciplinary Rule 1-101 (A) (4) (incorporated in Rule 29(a) of the Supreme Court of Arizona) prohibits attorneys from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See also *Health Systems Agency of Northern Virginia v. Virginia State Board of Medicine*, N.D. Va., No. 76-37-A, decided November 9, 1976, slip op. 13: "Narrowly tailored statutes, rather than broadside bans on advertising, are sufficient to prevent fraud and deception."



ciplinary Rule 2-102(A)(6) of the Supreme Court of Arizona.<sup>26</sup> If such information is not misleading to the layman when published in law lists, it would not be misleading when printed in a newspaper. Factual material such as name, address, and foreign language ability would be of obvious interest to the consumer, yet it would be unlikely to confuse or mislead.

It is conceivable that advertising of the price of legal services may be misleading, because the amount of work involved varies from case to case. But the Supreme Court of Arizona did not articulate such a rationale, and the Arizona Rule is not so limited. In any event, the argument would be untenable.

It is not misleading to advertise a set fee if the lawyer actually charges it. An attorney may offer certain routine services at a set fee, assuming that some cases will require more time than others but that the average return will be satisfactory. Attorneys agree to precisely such an arrangement when they join the Arizona Legal Services Plan (A. 239-

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<sup>26</sup> The American Bar Association adopted amendments to that rule in 1976. The amendments expand the range of information that may be placed in law lists to include: "whether credit cards or other credit arrangements are accepted; office and other hours of availability; a statement of legal fees for an initial consultation or the availability upon request of a written schedule of fees or an estimate of the fee to be charged for the specific services \* \* \*." The same information may also be placed in a directory published by a state, county, or local bar association and the classified section of the telephone directory. The Supreme Court of Arizona has not yet adopted these amendments.

241, 459-478). A similar system governs many prepaid legal service plans.<sup>27</sup> Many other professions do the same, with full knowledge that some jobs are more difficult and time consuming than others.

If an attorney conducts part of his practice on a flat fee basis, it is not misleading to publish that information in the newspaper. What is more, not all price advertising necessarily involves a set fee for a single service. The price of an initial half-hour consultation, for example, would be of interest to consumers. So would be the attorney's hourly rate. There is no reason to believe that such information is usually deceptive.

Some testimony in the record displayed a concern that an attorney who advertises fees would cut quality or engage in deceptive "add-on" tactics when confronted with a more complex case (A. 155, 378-381). Expert testimony in the record indicates, however, that advertising would not detrimentally affect the quality of legal services.<sup>28</sup> Indeed, this Court noted in *Virginia Pharmacy, supra*, slip op. 21, that an "advertising ban does not directly affect professional standards one way or the other." A professional inclined to cut corners will do so without regard to the existence of a ban upon advertising; such a ban merely tends to insulate him from competition.

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<sup>27</sup> Cf. Meeks, *Antitrust Aspects of Prepaid Legal Services Plans*, 1976 A.B.F. Res. J. 855; Pfennigstorf and Kimball, *Legal Service Plans: A Typology*, 1976 A.B.F. Res. J. 411.

<sup>28</sup> See the testimony of Professor Cox (A. 210).

Other professional sanctions are available to ensure quality. *Id.* at 21-22. The legal profession is closely regulated, and independent disciplinary rules prohibit an attorney from providing service of inadequate quality and from engaging in deceptive practices.<sup>29</sup> There is simply no evidence—and the Supreme Court of Arizona cited none—to indicate that the unscrupulous attorney is deterred from cutting corners by the advertising prohibition, or that the conscientious attorney would ignore the dictates of the Code of Professional Responsibility if he were permitted to advertise.

Concern has been expressed that laymen would blindly follow the lowest advertised price without considering the quality of legal service offered. Even if this were a proper consideration, it would not support a ban on all advertising. And it is not a proper consideration. This Court rejected precisely that argument in *Virginia Pharmacy*, slip op. 21-22, as inconsistent with the philosophy of the First Amendment. The Arizona ban on attorney advertising in

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<sup>29</sup> Disciplinary Rule 6-101(A)(2) prohibits an attorney from handling a matter without adequate preparation, and Disciplinary Rule 6-101(A)(3) prohibits neglect of a matter entrusted to an attorney. The Supreme Court of Arizona has adopted those rules. The Supreme Court of Arizona has not adopted Disciplinary Rule 6-101(A)(1) of the Code of Professional Responsibility, which prohibits an attorney from handling a matter he knows he is not competent to handle without associating competent counsel. Disciplinary Rule 1-102(A), which has been adopted by the Arizona Court, prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation.

the commercial media does not ensure that individuals will choose the most competent attorney; it merely deprives most consumers of the information on which to base their choice.

The United States recognizes that many attorneys are concerned that advertising will seriously erode the dignity or public esteem of the legal profession. The effectiveness of the legal profession stems, at least in part, from public respect. We doubt that a concern about “dignity”—a concern held in common with other professions—is an adequate justification for a total ban on advertising. But however that may be, the Supreme Court of Arizona did not find that advertising would impair public respect for the legal profession.

Engineers advertise, as do bankers and investment counselors; these professions are not regarded by the public as undignified. Clients might generally be expected to value respectability and dignity in a lawyer, so that few lawyers would engage in undignified advertising. Public cynicism concerning lawyers who publicly eschew solicitation—while structuring their social, civic, and even religious associations to provide contacts with clients—may be a much greater threat to public regard for the profession than a frank admission that lawyers are interested in attracting clients.<sup>30</sup> Thus, as the British

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<sup>30</sup> See Thurman, Phillips and Cheatham, *Cases on the Legal Profession* 122-123 (1970); Note, *Advertising, Solicitation and Legal Ethics*, 7 Vand. L. Rev. 677, 679 (1954).



Monopolies and Mergers Commission reported to Parliament:<sup>31</sup>

[T]he public are well aware that solicitors are in practice for the purpose, among others, of earning a living. We do not think they will be surprised or shocked if members of the profession invite custom explicitly and informatively.

There has also been concern that advertising by attorneys may stir up unwarranted litigation. See, e.g., Drinker, *Legal Ethics, supra*, at 212. That view cannot be reconciled with the modern acceptance of the courts as a forum for vindicating individual rights. See *N.A.A.C.P. v. Button, supra*.<sup>32</sup> There is no justification for discouraging litigation of all sorts in order to deter unwarranted litigation. The encouragement of frivolous, harassing, malicious, or unwarranted litigation is independently prohibited by Disciplinary Rule 7-102(A). The ban on advertising inhibits the assertion of legal rights by the segment of society least familiar with its rights; it

<sup>31</sup> Monopolies and Mergers Commission, *Services of Solicitors in England and Wales: A Report on the Supply of Services of Solicitors in England and Wales in Relation to Restrictions on Advertising* 40 (1976).

<sup>32</sup> See also Radin, *Maintenance by Champerty*, 24 Cal. L. Rev. 48 (1935); Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. Chi. L. Rev. 674 (1958); Comment, *The Bar As a Trade Association: Economics, Ethics, and the First Amendment*, 5 Harv. Civ. Rts.—Civ. Lib. L. Rev. 334 (1970); Christensen, *Lawyers for People of Moderate Means, supra*.

does not discourage litigation generally or ensure that litigation will be meritorious.<sup>33</sup>

The United States therefore submits that none of the justifications for a sweeping ban on advertising by attorneys in the commercial media is sufficient to overcome the First Amendment rights of willing speakers and willing listeners. Appellants were penalized for violating such a broad ban, for the very act of notifying the public of their existence. Because of the breadth of the Arizona ban, and because the Arizona court did not articulate any reasons for the ban, this case does not require the Court to decide whether some more specific prohibition would be constitutional.

We believe, however, that more specific and less restrictive means can be devised to address legitimate public concerns. The Standing Committee on Ethics and Professional Responsibility of the American Bar Association has proposed a revision of Canon Two that would permit advertising unless the material contains a "false, fraudulent, misleading, deceptive or unfair statement or claim."<sup>34</sup> The Board of Gov-

<sup>33</sup> In any case, the broad Arizona restraint cannot be justified by concern about unwarranted litigation, because it applies equally to the advertisement of services not directly related to litigation, such as changes of name and the drafting of wills.

<sup>34</sup> The proposed disciplinary rule would define ten categories of prohibited statements. See *Discussion Draft: Proposed Amendments to Ethical Considerations and Disciplinary Rules*



ernors of the District of Columbia Bar has petitioned the District of Columbia Court of Appeals to modify Canon Two, and Disciplinary Rules 2-101 through 2-105, to permit advertising.<sup>35</sup> The Board of Governors of the California State Bar has proposed a rule that would expand the information permitted to be contained in law lists, and would permit the publication of identical material in the commercial media.<sup>36</sup> The British Monopolies and Mergers Commission has recommended that solicitors be allowed to advertise by any method, provided only that:<sup>37</sup>

- (1) No advertisement, circular or other form of publicity used by a solicitor should claim for his practice superiority in any respect over any or all other solicitors' practices.
- (2) Such publicity should not contain any inaccuracies or misleading statements.
- (3) While advertisements, circulars and other publicity or methods of soliciting may make clear the intention of the solicitor to seek custom, they should not be of a character

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of Canon 2 of the Code of Professional Responsibility (December 6, 1975) (reproduced as Appendix C, *infra*, pp. 62a-94a).

<sup>35</sup> See Petition of the Board of Governors of the District of Columbia Bar For Amendments to Rule X of the Rules Governing the Bar of the District of Columbia, filed in the District of Columbia Court of Appeals, November 10, 1976 (reproduced as Appendix B, *infra*, pp. 10a-61a).

<sup>36</sup> See Appendix D, *infra*, pp. 95a-130a.

<sup>37</sup> Monopolies and Mergers Commission, *supra*. See Appellants' Br. App. 9a-10a.

that could reasonably be regarded as likely to bring the profession into disrepute.

The United States does not necessarily endorse any of these proposals. They demonstrate, however, that the legitimate concerns of the public and the profession can be vindicated by rules less restrictive than Arizona's total ban on advertising by attorneys. Arizona has not attempted to tailor its rules to any specific legitimate concern. The absolute ban Arizona has imposed on advertising by lawyers in the commercial media is not responsive to any legitimate justification for restrictions on attorney advertising, and it cannot stand.

#### CONCLUSION

The judgment of the Supreme Court of Arizona should be reversed.

Respectfully submitted.

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## APPENDIX A

## THE INADEQUATE DISTRIBUTION OF LEGAL SERVICES IN THE UNITED STATES

Legal services are not equitably distributed. The American Bar Association has stated that "the middle 70% of our population is not being reached or served adequately by the legal profession."<sup>1</sup> Professor Cheatham has explained:<sup>2</sup>

As the proportion of the poor has gone down, the proportion of the middle classes has gone up, so that an increasing proportion of our people

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<sup>1</sup> American Bar Association, *Revised Handbook on Prepaid Legal Services: Papers and Documents Assembled by the Special Committee on Prepaid Legal Services* 2 (1972). See also the statement of Orville H. Schell, Jr., President of the Association of the Bar of the City of New York, during the Hearings on "The Organized Bar: Self-Serving or Serving the Public," before the Subcommittee on the Representation of Citizens Interests of the Senate Judiciary Committee, 93d Cong., 2d Sess. (1974), reprinted in Curran and Spalding, *infra*, at 11:

[A] high percentage of people in this country are not receiving adequate legal services. The estimated percentages run from 60-90% of the population. Whatever estimate you take the numbers are staggering.

See generally Christensen, *Lawyers for People of Moderate Means* (1970); Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Court and Lawyering Services*, 48 N.Y.U. L. Rev. 595 (1973); Meserve, *Our Forgotten Client: The Average American*, 57 A.B.A.J. 1092 (1971).

<sup>2</sup> Cheatham, *A Lawyer When Needed: Legal Services for the Middle Classes*, 63 Colum. L. Rev. 973, 973-974 (1963).

are able to pay for the legal services they need. Further, the increase in wealth brings an increase in the legal problems of acquiring and disposing of property, and thus the need for legal services goes up faster than the proportion of the middle classes.

Yet these growing classes with an increasing need for legal services do not obtain in proportionate measure the legal services they need, at least from lawyers. The wide gap between the need and its satisfaction by the bar has been indicated by numerous studies beginning in the 1930's. \* \* \*

\* \* \* The middle classes lack the sentimental appeal of the poor, and they are unprofitable clients for the most successful members of the profession. Neither sentiment nor interest has led the profession to give to this largest part of our people the attention they merit.

A recent study commissioned by the American Bar Association's Special Committee to Survey Legal Needs indicates that more than 30 percent of the population has never consulted a lawyer, and almost another 30 percent has consulted a lawyer only once.<sup>3</sup>

<sup>3</sup> Curran and Spalding, *The Legal Need of the Public* 79-81 (1974) (Preliminary Report of a National Survey by the Special Committee to Survey Legal Needs of the American Bar Association, in collaboration with the American Bar Foundation). The survey showed that 67 percent of the population has consulted a lawyer, of which 28.9 percent of the population has consulted a lawyer only once. See also Missouri Bar-Prentice Hall Survey, *A Motivational Study of Public Attitudes and Law Office Management* (1963), in Murphy and Walkowski, *Compilation of Reference Materials on Pre-paid Legal Services* 4 (American Bar Association 1973),

A study of working class Americans indicated that only 54 percent had ever consulted a lawyer, and that more than half of those individuals had done so only once.<sup>4</sup>

Individuals unfamiliar with legal services often do not realize that the services of a lawyer would be desirable.<sup>5</sup> For example, only 68 percent of the

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which concludes that only 64 percent of their sample had ever consulted a lawyer; Industrial Social Welfare Center of the Columbia University School of Social Work, *Legal Need of Clerical Workers Members of the New York District of American Federation of State, County and Municipal Employees* (1972), summarized in Murphy and Walkowski, *supra*, concludes that only 69 percent of the respondents had ever consulted a lawyer.

<sup>4</sup> Marks, Hallauer and Clifton, *The Shreveport Plan: An Experiment in the Delivery of Legal Services* 33 (1974) (study of the members of a construction union). See also Marks, *The Legal Needs of the Poor: A Critical Analysis* 8 n. 10 (American Bar Foundation 1971); Pfennigstorf and Kimball, *Legal Service Plans: A Typology*, 1976 A.B.F. Res. J. 411 (collecting sources); Getman, *A Criticism of the Report on the Shreveport Experiment*, 3 J. Legal Studies 487 (1974). Professor Getman suggests that the study of the Shreveport Plan was improperly executed, but he does not call into question the gist of the argument in this appendix.

<sup>5</sup> See Koos, *The Family and the Law: Report of a Study of Family Needs as Related to Legal Services* (1952), summarized in Murphy and Walkowski, *supra*, at 7 (although 41.6 percent of the middle class families surveyed had experienced a "legal" problem in the preceding year, only 80 percent of the families with a problem recognized the need for legal assistance, and only 60 percent obtained legal counsel. Among working class families, 35.6 percent had experienced a prob-



union members questioned in one study realized that a lawyer could be of any assistance if an individual were threatened with eviction by his landlord in retaliation for complaints about defective wiring.<sup>6</sup>

Even individuals who realize that the services of a lawyer would be of assistance frequently do not obtain counsel. The American Bar Association's recent study indicated that 19 percent of the respondents had not obtained counsel in situations where they felt a need for it.<sup>7</sup> Of 1,040 New York City clerical workers responding to another survey, 564 reported unfulfilled needs for legal services. The same survey showed that the number of occasions on which legal representation had been obtained was approximately equal to the number of occasions on which the workers did not obtain such services, despite recognizing the need.<sup>8</sup> Similarly, the Shreveport study of construction workers indicated the following high percentages of

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lem, but only 44.2 percent of those families obtained counsel). See also American Bar Association, *Revised Handbook on Prepaid Legal Services*, *supra*, at 2:

The public fears the cost of legal services. They are frequently not aware of what problems are "legal" and what lawyers can do to solve such problems. They seldom avail themselves of the counselling skills of the lawyer to plan for the future or to prevent future difficulty. Their contact with a lawyer occurs only when a crisis situation demands it.

<sup>6</sup> Marks, Hallauer and Clifton, *supra*, at 49.

<sup>7</sup> Curran and Spalding, *supra*, at 85.

<sup>8</sup> Industrial Social Welfare Center, *Legal Needs of Clerical Workers Members*, *supra*.

union members who did *not* consult an attorney with respect to matters generally recognized as requiring the services of a lawyer: drawing of will, 92 percent; representation in connection with an arrest, 86 percent; experienced racial discrimination in obtaining employment or housing, 100 percent; purchasing a house or land, 69 percent.<sup>9</sup>

There are several reasons why individuals fail to obtain counsel even when they recognize a need for it. Foremost among those are the high cost (or fear of the cost)<sup>10</sup> of legal services and inability to locate a lawyer willing and competent to deal with the problem.<sup>11</sup>

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<sup>9</sup> Marks, Hallauer and Clifton, *supra*, at 35.

<sup>10</sup> See *Report of the Special Committee on the Availability of Legal Services*, adopted by the House of Delegates of the American Bar Association (February 1968), noted in American Bar Association, *Revised Handbook on Prepaid Legal Services*, *supra*, at 26:

We are persuaded that the actual or feared price of such services coupled with a sense of unequal bargaining status is a significant barrier to wide utilization of legal services.

See also Industrial Social Welfare Center, *Legal Need of Clerical Workers Members*, *supra*, at 2 (514 of 1,040 respondents said that expected costs are a reason for not using a lawyer's services); Koos, *supra*, at 11.

<sup>11</sup> See Curran and Spalding, *supra*, at 95. Among the respondents to that survey, 48.3 percent strongly agreed, and another 30.9 percent slightly agreed, with the statement that people do not go to lawyers because they have no way to learn the names of lawyers competent to handle the problem. See also Christensen, *Lawyers for People of Moderate Means*, *supra*, ch. IV.

The individual's fear of the cost is often exaggerated. A study of middle class individuals revealed that they overestimated lawyers' fees by 91 percent for the drawing of a simple will, 340 percent for reading and giving advice about a two-page installment sales contract, and 123 percent for 30 minutes of consultation and general advice.<sup>13</sup>

At least part of the failure of people to realize their own needs for legal services results from a lack of communication by the bar. The same can be said of decisions not to seek legal services that are based upon mistaken notions about the cost or availability of such services. Not surprisingly, therefore, most scholars on the subject agree that advertising would be of significant value in improving the delivery of legal services to those most in need. See, e.g., Christensen, *Lawyers for People of Moderate Means* 137-138 (1970):

Such an increase in information would almost surely help people to recognize their legal problems, to see their need for lawyers' help, and to get in touch with the right lawyers more readily than at present \* \* \*. The end result should

<sup>13</sup> See the study by James G. Frierson, described in the Petition of the Board of Governors of the District of Columbia Bar for Amendments to Rule X of the Rules Governing the Bar of the District of Columbia (App. B, *infra*, pp. 24a-25a). The Shreveport study similarly demonstrated that 62 percent of the respondents estimated that an initial half-hour consultation would cost more than \$10, although half of the lawyers in Shreveport reported that they did not charge for such a consultation if no further work was involved. Marks, Hallauer and Clifton, *supra*, at 50.

be increased public utilization of lawyers, with people of moderate means obtaining much legal help they would not otherwise get. This is clearly the most important value that may be served by allowing lawyers greater freedom to advertise and solicit legal business.

Similarly, the Monopolies and Mergers Commission recently presented a report to the British Parliament recommending that British solicitors be permitted to advertise.<sup>13</sup> The Commission concluded that the public was in need of additional information concerning legal services, that advertising may increase public trust and confidence in the profession, and that the current prohibition on advertising deprives the public of legal services and reduces the stimulus to efficient delivery of those services. Monopolies and Mergers Commission, *Services of Solicitors in England and Wales: A Report on the Supply of Services of Solicitors in England and Wales in Relation to Restrictions on Advertising* (1976).<sup>14</sup>

Economic theory and empirical evidence support the conclusion that dissemination of price information would help to lower the cost of legal services through

<sup>13</sup> See also Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 Yale L.J. 1181 (1972).

<sup>14</sup> In a companion study concerning barristers, the Commission concluded that no changes were necessary, primarily because barristers are not hired directly by laymen. Monopolies and Mergers Commission, *Barristers' Services: A Report on the Supply of Barristers' Services in Relation to Restrictions on Advertising* 22-24 (1976).



competition.<sup>15</sup> Comparison shopping for legal services is difficult, and more difficult for some than others.<sup>16</sup> Unless an attorney is willing to quote a price on the telephone,<sup>17</sup> the client must go to an unfamiliar office and discuss his problem with the attorney in person before discovering the approximate cost of the service. He must face the potential embarrassment of having to admit, after consultation, that he cannot afford the fee. The cost of gathering fee information is especially high if a working person must visit an attorney during working hours. These impediments make effective price comparisons impractical.

The ban on advertising in the commercial media also inhibits the development of new forms of legal practice designed to improve the delivery of legal services. Appellants' legal clinic is an example of such an experiment. Such clinics are valuable to the middle class, for they offer a limited range of routine services at a reasonable cost by relying on the

<sup>15</sup> See note 14, *supra*, in the text of the brief.

<sup>16</sup> The record includes testimony from a representative of a senior citizens' group indicating that its members are particularly concerned with obtaining advance knowledge of the cost of legal services. See testimony of James L. Jones, a Director of the Phoenix Chapter of the American Association of Retired Persons (A. 133-144). Mr. Jones testified that appellants' advertisement would be of assistance to members of the group in obtaining legal services because it discusses cost.

<sup>17</sup> If an attorney is willing (and allowed) to quote a price over the telephone, there is no sound reason why he should not be allowed to advertise that price.

use of paraprofessionals and specialization.<sup>18</sup> Appellants testified that a "legal clinic," which requires a large volume, cannot succeed without advertising.<sup>19</sup> Even if legal clinics, or other experimental forms of practice, could exist without advertising, the Arizona rule would inhibit those in need of such services from learning of them.

<sup>18</sup> See Interview with Thomas Ehrlich, then Dean of Stanford Law School, *Complaints About Lawyers, Are They Justified*, U.S. News and World Rep. 49 (July 21, 1975); Brickman, *Expansion of the Lawyering Process Through a New Delivery System: The Emergence and State of Legal Paraprofessionalism*, 71 Colum. L. Rev. 1153 (1971); Note, *supra*, 81 Yale L.J. at 1206; Christensen, *supra*, at 45, 81; Johnstone and Hopson, *Lawyers and Their Work* 543-545 (1967); Hearings before the Subcommittee on the Representation of Citizen Interests of the Senate Judiciary Committee, *supra*, at 43 (statement of Stuart Kadison, Chairman of the ABA Special Committee on the Delivery of Legal Services), *id.* at 85 (statement of Orville Schell, President of the Association of the Bar of the City of New York), *id.* at 88 (statement of Thomas Ehrlich).

<sup>19</sup> See A. 129. Dean Ehrlich agrees that advertising is necessary for the development of legal clinics. See Interview, *Complaints About the Legal Profession*, *supra*, at 49.



## APPENDIX B

IN THE  
DISTRICT OF COLUMBIA COURT OF APPEALS  
PETITION OF THE BOARD OF GOVERNORS OF  
THE DISTRICT OF COLUMBIA BAR FOR  
AMENDMENTS TO RULE X OF THE  
RULES GOVERNING THE BAR OF  
THE DISTRICT OF COLUMBIA

The Board of Governors of the District of Columbia Bar respectfully petitions this Court, pursuant to Rule XIII, Section 1 of the District of Columbia Court of Appeals Rules governing the Bar of the District of Columbia, to amend the American Bar Association's Code of Professional Responsibility as amended by this Court, and incorporated in Rule X of the Rules of the District of Columbia Court of Appeals governing the Bar of the District of Columbia. The proposed amendments are set out in Exhibit A hereto.

The amendments proposed by the Board of Governors are explained in the report of the Legal Ethics Committee on proposed amendments to the Code of Professional Responsibility dealing with advertising and solicitation by lawyers. The full report and recommendations of the Legal Ethics Committee were adopted with the exception of ethical consideration EC 2-9 at its regular meeting on Tuesday, November 9, 1976. A copy of that report, together with the dissent of one member of that committee, is attached hereto as Exhibit B.

As Exhibit C, the Board of Governors also submits a copy of the monograph prepared under the direction of Lewis A. Rivlin, entitled "The Future of the Regulation of the Legal Profession: Antitrust Jurisdiction in the District of Columbia after *Goldfarb*".

WHEREFORE, the Board of Governors respectfully requests this Court grant the petition and amend the Rules as set forth herein in Exhibit A.

Respectfully submitted,

/s/ CHARLES R. WORK  
Charles R. Work, President

Dated: November 10, 1976

## PROPOSED AMENDMENTS

Note: Boldface indicates proposed additions;  
(Parenthesis and Italics indicates proposed deletions.)

## ETHICAL CONSIDERATIONS

EC 2-1. The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of (*acceptable*) **competent** legal counsel whose fees they can afford. Hence, important functions of the legal profession are to educate (*laymen*) **members of the public** to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

## RECOGNITION OF LEGAL PROBLEMS

EC 2-2. The legal profession should assist (*layman*) **members of the public** to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers (*acting under proper auspices*) should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. (*Such educational programs should be motivated by a desire to benefit the public rather than to obtain publicity or employment for particular lawyers. Examples of*

*permissible activities include preparation of institutional advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs. But a lawyer who participates in such activities should shun personal publicity.*)

EC 2-3. Whether a lawyer acts properly in volunteering advice to a (*layman*) **member of the public** to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist (*laymen*) **members of the public** in recognizing legal problems. The advice is proper (*only if*) **whenever it is motivated in whole or in part by a desire to protect one who does not recognize that he or she may have legal problems or who is ignorant of his or her legal rights or obligations.** (*Hence, the advice is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause litigation to be brought merely to harass or injure another. Obviously, a lawyer should not contact a non-client, directly or indirectly, for the purpose of being retained to represent him for compensation.*)

EC 2-4. (*Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers advice that one should obtain the services of a lawyer generally should not himself accept em-*

ployment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.) **The purpose of encouraging lawyers to volunteer advice to members of the public is to fulfill the duty to make legal counsel available by informing members of the public of their legal rights and of the availability of effective legal assistance. Accordingly, lawyers should scrupulously avoid making any false or misleading statements to members of the public regarding their rights or regarding the ability of lawyers in general or of particular lawyers to provide effective assistance.**

EC 2-5. A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for *(laymen)* **members of the public** should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

## SELECTION OF A LAWYER: GENERALLY

EC 2-6. Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in whom he or she had confidence. This traditional selection process worked well because it was initiated by the client and the choice was an informed one.

EC 2-7. Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable *(laymen)* **members of the public** to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many *(laymen)* **members of the public** have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers. **In addition, many people feel uncertain about whether lawyers are interested in helping them, and about the possible expense of preliminary interviews, and they are therefore reluctant to approach lawyers to seek legal counsel.**

EC 2-8. *(Selection of a lawyer by a layman often is the result of the advice and recommendation of third parties—relatives, friends, acquaintances, business associates, or other lawyers. A layman is best*



served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations.) Because of changed conditions, lack of knowledge about the availability of lawyers, and the reluctance of many people to seek needed legal assistance, people are, as a practical matter, being denied effective legal assistance. In order to inform people of the availability of counsel, increase the likelihood of intelligent selection of attorneys by members of the public, and eliminate misunderstanding about fees, lawyers should freely provide information about their availability to accept particular kinds of cases, their experience in handling such cases, and their fees.

#### SELECTION OF A LAWYER: PROFESSIONAL NOTICES AND LISTINGS

(EC 2-9 The traditional ban against advertising by lawyers, which is subject to certain limited exceptions, is rooted in the public interest. Competitive advertising would encourage extravagant, artful, self-laudatory brashness in seeking business and thus could mislead the layman. Furthermore, it would inevitably produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers. Thus, public confidence in our legal system would be impaired by such advertisements of profes-

sional services. The attorney-client relationship is personal and unique and should not be established as the result of pressures and deceptions. History has demonstrated that public confidence in the legal system is best preserved by strict, self-imposed controls over, rather than by unlimited, advertising.)

EC 2-10. (Methods of advertising that are subject to the objections stated above should be and are prohibited. However,) The Disciplinary Rules recognize the value of giving assistance in the selection process through forms of advertising that furnish identification of a lawyer (while avoiding such objections. For example, a lawyer may be identified in the classified section of the telephone directory, in the office building directory, and on his letterhead and professional card. But at all times the permitted notices should be dignified and accurate.) and such additional information that is accurate and that might assist a potential client in making an informed choice of an attorney. Care should be taken, however, to avoid creating unrealistic expectations in particular cases. In addition, lawyers should strive to provide information to the public in ways that comport with the dignity of the profession and that do not tend to demean the administration of justice.

EC 2-11. The name under which a lawyer conducts his or her practice may be a factor in the selection process. The use of a trade name or an assumed name should be avoided if it could mislead (laymen) members of the public concerning the identity, responsibility, and status of those practicing

thereunder. (Accordingly, a lawyer in private practice should practice only under his own name, the name of a lawyer employing him, a partnership name composed of the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, in the name of a professional legal corporation, which should be clearly designated as such.) For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

EC 2-12. A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his **or her** name to remain in the name of the firm if he **or she** actively continues to practice law as a member thereof. Otherwise, *(his)* **the lawyer's** name should be removed from the firm name, and he **or she** should not be identified as a past or present member of the firm; and *(he)* **the lawyer** should not *(hold himself)* **be held out as being a practicing lawyer.**

EC 2-13. In order to avoid the possibility of misleading persons with whom he **or she** deals, a lawyer should be scrupulous in the representation of his **or**

her professional status. *(He)* **A lawyer** should not hold himself **or herself** out as being a partner or associate of a law firm if he **or she** only shares offices with another lawyer.

*(EC 2-14. In some instances a lawyer confines his practice to a particular field of law. In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist or as having special training or ability, other than in historically excepted fields of admiralty, trademark, and patent law.)*

*(EC 2-15. The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.)*



## DISCIPLINARY RULES

*(Present Disciplinary Rules DR 2-101 thru DR 2-105 are deleted and rewritten as follows.)*

**DR 2-101.** A lawyer shall not knowingly make any representation about his or her ability, background, or experience, or that of the lawyer's partner or associate, that is false or misleading, and that might reasonably be expected to induce reliance by a member of the public.

**DR 2-102.** A lawyer shall not knowingly give a client or potential client a false or misleading impression of the state of the law, such as by overstating the likelihood that a particular outcome will result from litigation, or by stating what is merely the lawyer's opinion about the law as if it were a conclusively established rule of law.

**DR 2-103.** A lawyer shall not solicit or advertise to potential clients in any way that would violate a valid law or regulation, or a contractual or other legal obligation of the person through whom the lawyer seeks to communicate.

**DR 2-104.** A lawyer shall not solicit a potential client who has given the lawyer adequate notice that he or she does not want to receive communications from the lawyer.

**DR 2-105.** A lawyer shall not hold himself or herself out as having a partnership with one or more other lawyers unless they are in fact partners. A partnership shall not be formed or continued between or among lawyers licensed in different ju-

risdictions unless all enumerations of the members and associates of the firm on its letterhead and in other listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.\*

## RATIONALE OF THE AMENDMENTS

Rules of legal ethics are, broadly speaking, of two kinds. Rules of the first kind relate to the integrity of the system of administering justice and are designed to insure that the system will function effectively and fairly. Those rules include such matters as full access to the legal system, the competence and independence of counsel, preservation of clients' confidences, and zealous representation within the bounds of law. Rules of the second kind are those that are concerned less with the integrity of the system and more with the conduct of lawyers as members of a guild or trade association. Such rules, which are principally anticompetitive, include maintenance of minimum fees and restrictions on advertising and solicitation.

Canon 2 of the Code of Professional Responsibility contains both provisions that relate to the integrity of the system and provisions that relate to restrictions on competition. The guild or anticompetitive

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\* Proposed DR 2-105 is derived substantially from the present 2-102(C) and (D).



provisions of Canon 2 may have perverted the more fundamental provisions of that Canon, which are concerned with the integrity of the system.

The "axiomatic norm"<sup>1</sup> that serves as the headnote to Canon 2 is: "A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available." The Ethical Considerations and the footnotes to Canon 2 explain the crucial relationship of that Canon to the integrity of the administration of justice. Members of society "have need for more than a system of law; they have need for a system of law which functions, and that means they have need for lawyers."<sup>2</sup> However, legal problems "may not be self-revealing and often are not timely noticed."<sup>3</sup> The need of members of the public for legal services is met, therefore, "only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel."<sup>4</sup> Quoting Justice Lewis F. Powell, Jr. (then President of the American Bar Association), the Code notes that, when people are denied their day in court because ignorance has prevented them from obtaining counsel, there is a denial of the fundamental right to equal

<sup>1</sup> See Code of Professional Responsibility, Preliminary Statement.

<sup>2</sup> Cheatham, "The Lawyer's Role and Surroundings," 25 Rocky Mt. L. Rev. 405 (1953), quoted in Canon 2, n. 1.

<sup>3</sup> EC 2-2.

<sup>4</sup> EC 2-1.

justice under law.<sup>5</sup> Thus, a "basic tenet" of the professional responsibility of lawyers is that "every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence."<sup>6</sup>

The scope of our failure to achieve equal justice under law, in the rudimentary sense of providing access to legal services, is illustrated by the estimate of a Special Committee of the American Bar Association that effective access to legal services is being denied to at least 70 percent of our population, which amounts to as many as 140,000,000 people.<sup>7</sup> Other responsible authorities suggest that the correct figure is substantially higher.<sup>8</sup> Moreover, as recognized in the Code of Professional Responsibility, a principal cause of the under-use of available legal services is ignorance on the part of members of the public regarding the need, availability, and cost of legal services.<sup>9</sup> Furthermore, the Code also recognizes that institutional advertising has been employed for decades,<sup>10</sup> but such efforts obviously have proved inadequate to cope with the problem.

<sup>5</sup> Canon 2, n. 3.

<sup>6</sup> EC 1-1.

<sup>7</sup> ABA Special Committee on Prepaid Legal Services, a Primer of Prepaid Legal Services (1974).

<sup>8</sup> Tunney and Frank, "Federal Roles in Lawyer Reform," 27 Stan. L. Rev. 333, 343 & n. 36 (1975).

<sup>9</sup> See EC 2-1, 2-2, 2-6, 2-7, and footnotes 1 through 7, and 17.

<sup>10</sup> Canon 2, n. 4-7.

A dramatic illustration of the relationship between under-use of legal services and ignorance on the part of members of the public is provided in a study undertaken by James G. Frierson, who is both an attorney and an associate professor of business administration at East Tennessee State University. Professor Frierson first determined what the charge would be in Johnson City, Tennessee, to have a lawyer draw a simple will for a husband, or read and give advice on a two-page consumer installment contract, or discuss a potential legal problem and give some general advice without any research, spending about 30 minutes with the client. He then determined what middle class people in the same city expected to have to pay for those services. Frierson discovered that middle class consumers overestimated lawyers' fees by 91 percent for the drawing of a simple will, 340 percent for reading and giving advice on a two-page installment sales contract, and 123 percent for 30 minutes of consultation and general advice.<sup>11</sup>

Professor Frierson also found that 75 percent of his sample had not seen a lawyer on any personal matter within the previous five years, that 75 percent had no will, although a substantial number were married with children, and that 75 percent had signed an installment sales contract in the previous

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<sup>11</sup> Affidavit of James G. Frierson in *Consumers Union of the United States, Inc. v. American Bar Association*, No. 0105-R (E.D. Va. 1975).

five years.<sup>12</sup> On the basis of his survey Frierson concluded that average middle class consumers do not use the services of a lawyer "primarily because of their grossly inflated expectations of lawyers' charges."<sup>13</sup>

Frierson's study, of course, serves only to confirm what has been known by the profession and recognized in the Code of Professional Responsibility. As we have seen, the axiomatic norm that stands as a headnote to Canon 2 that "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available." The difficulty arises from the fact that the first five Disciplinary Rules under Canon 2 are devoted not to ensuring adequate information about the availability and cost of legal services but, rather, to restricting the communication of relevant information by proscribing advertising and solicitation by lawyers. Thus, DR 2-101 forbids a lawyer to use any means of commercial publicity, DR 2-102 imposes narrow limitations on the use of such things as professional cards, letterheads, and telephone directory listings, DR 2-103 forbids a lawyer to recommend that a non-lawyer retain the lawyer's services if the non-lawyer has not initiated the contact by seeking legal advice, DR 2-104 says that a lawyer who has given unsolicited legal advice to a member of the public shall not accept employment resulting from that advice, and DR 2-105 for-

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<sup>12</sup> Ibid.

<sup>13</sup> *Barrister Magazine*, vol. 2, n. 1, pp. 6, 8 (Winter, 1975).



bids a lawyer to indicate that he or she specializes in a particular area of the law.<sup>14</sup>

Those are the provisions, of course, that have effectively blocked any real efforts to provide relevant and necessary information to members of the public, and have thereby made a mockery of the overriding professional obligation to provide access to the legal system. It is becoming increasingly recognized, however, that the prohibitions against advertising and solicitation are not only unwise as a matter of public policy but also of dubious validity under both the antitrust laws and the Constitution.

In the antitrust area, the Supreme Court recently decided in *Goldfarb v. Virginia State Bar*<sup>15</sup> that the publication and enforcement by bar associations of minimum fee schedules violate the Sherman Act. The principal issue in *Goldfarb* was whether the practice of law, as a "learned profession," is outside the scope of the Sherman Act, which is concerned with "trade or commerce." The Supreme Court held that the sale of a service for money is "commerce" and went on to observe that, "It is no disparagement of the practice of law as a profession to acknowledge that it has

<sup>14</sup> In each of those instances, arbitrary exceptions are provided, e.g., self-laudatory advertising can be purchased in a number of publications approved by the American Bar Association, a lawyer may solicit employment among friends, relatives, and former clients, and specialists in patent, trademarks, and admiralty law may so designate themselves.

<sup>15</sup> 421 U.S. 773 (1975).

this business aspect. . . ." <sup>16</sup> The Court also noted that, "In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce." <sup>17</sup>

The *Goldfarb* opinion was written by the Chief Justice and there was, remarkably, not a single dissent. (Mr. Justice Powell, who had been president of the Virginia State Bar, did not participate.) In addition, the Antitrust Division of the Department of Justice has adopted the position that a proscription of advertising and solicitation also violates the Sherman Act.<sup>18</sup>

Antitrust policies are not, however, the most appropriate concerns in assessing advertising and solicitation by attorneys. As indicated at the outset, the Ethical Considerations dealing with access to the legal system are rooted in the fundamental right of equal justice under law. In addition, the right of lawyers to communicate with potential clients, and the rights of members of the public to be informed by those communications, are protected by a variety of constitutional rights, including freedom of speech, the right to petition for redress of grievances, freedom of association, and the right to due process of law. Indeed, the Supreme Court has already held

<sup>16</sup> *Id.* at 787.

<sup>17</sup> *Id.* at 788.

<sup>18</sup> See "Law Firm Advertising," 44 U.S.L.W. 2008 (July 1, 1975).



in a series of cases of major importance that rules of professional ethics, including those relating to advertising and solicitation, must give way to constitutional rights.

The first case in that series was *NAACP v. Button*,<sup>19</sup> which considered solicitation of clients in the context of efforts of the NAACP to recruit plaintiffs for school desegregation cases. The NAACP called a series of meetings, inviting not only its members, and not only poor people, but all members of the community. At those meetings, the organization's paid staff attorneys took the platform to urge those present to authorize the lawyers to sue in their behalf.<sup>20</sup> The NAACP maintained the ensuing litigation by defraying all expenses, regardless of the financial means of a particular plaintiff.

Virginia contended that the NAACP's activities constituted improper solicitation under a state statute and fell within the traditional state power to regulate professional conduct. The Supreme Court held, however, that "the State's attempt to equate the activities of the NAACP and its lawyers with common-law barratry, maintenance and champerty, and to outlaw them accordingly, cannot obscure the serious encroachment . . . upon protected freedoms of expres-

<sup>19</sup> 371 U.S. 415 (1963).

<sup>20</sup> The Court has recognized the critical importance of solicitation to effective litigation in noting that proscription of solicitation in *Button* would have "seriously crippled" the efforts of the NAACP. *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967).

sion."<sup>21</sup> The Court concluded: "Thus it is no answer to the constitutional claims asserted by petitioner to say, as the Virginia Supreme Court of Appeals has said, that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."<sup>22</sup>

Subsequently, in *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*,<sup>23</sup> the Supreme Court considered the question of solicitation in a case in which a union's legal services plan resulted in channeling all or substantially all of the railroad workers' personal injury claims, on a private fee basis, to lawyers selected by the union and touted in its literature and at meetings. The Court again upheld the solicitation on constitutional grounds, despite the objection of the two dissenting justices that by giving constitutional protection to the solicitation of personal injury claims, the Court "relegates the practice of law to the level of a commercial enterprise," "degrades the profession" and "contravenes both the accepted ethics of the profession and the statutory and judicial rules of acceptable conduct."<sup>24</sup>

In *United Mine Workers v. Illinois Bar Ass'n*, the Supreme Court dealt with the argument that *Button*

<sup>21</sup> *NAACP v. Button*, *supra* note 19 at 438.

<sup>22</sup> *Id.* at 438-39.

<sup>23</sup> 377 U.S. 1 (1964).

<sup>24</sup> *Id.* at 19 (dissent of Mr. Justice Clark).

should be limited to litigation involving major political issues and not be extended to personal injury cases. The Court held: "The litigation in question is, of course, not bound up with political matters of acute social moment, as in *Button*, but the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with small ones are guarded. . . .'"<sup>25</sup> Finally, in the *United Transportation Union* case, the Court reversed a state injunction designed, in Mr. Justice Harlan's words, "to fend against 'ambulance chasing.'"<sup>26</sup> In that case a union paid investigators to keep track of accidents, to visit injured members, taking contingent fee contracts with them, and to urge the members to engage named private attorneys who were selected by the union and who had agreed to charge a fee set by prior agreement with the union. The investigators were also paid by the union for any time and expenses incurred in transporting potential clients to the designated lawyers' offices to enter retainer agreements.

In approving that arrangement, the Court reiterated that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."<sup>27</sup> What is important to bear in mind, how-

<sup>25</sup> 389 U.S. 217, 223 (1967).

<sup>26</sup> *United Transp. Union v. State Bar*, 401 U.S. 576, 597 (1971) (dissent of Mr. Justice Harlan).

<sup>27</sup> *Id.* at 585.

ever, is that: (1) the attorneys in question were not in-house counsel for the union but private practitioners; (2) the attorneys earned substantial fees; (3) the cases were not "public interest" cases in the restricted sense but were ordinary personal injury cases; and (4) the attorneys were retained as a result of the activities of "investigators," paid by the union, whose job it was to find out where accidents had occurred, to visit the victims as promptly as possible, to "tout" the particular lawyers and, if necessary, to take the victim to the lawyers' office to get a contingent fee contract signed.<sup>28</sup>

It might be suggested that the three union cases involved group legal services, with the solicitation restricted to members of the union. Although there are references in those cases to rights of association, other language in the opinions is much broader. The Court noted in *United Mine Workers* that "the First Amendment does not protect speech and assembly only to the extent it can be characterized as political."<sup>29</sup> Similarly, the First Amendment does not pro-

<sup>28</sup> The only question not decided by the Court was whether the investigators could properly have been paid directly by the lawyers. The dissenting Justices would have disapproved such a practice, while the majority simply did not reach the issue, on the ground that it was not in the record before them. It is difficult, however, to see why a significant distinction should turn on who pays the investigator. An unsophisticated person needs information about the availability of legal services, regardless of whether he or she is a member of a union and regardless of who pays the informant.

<sup>29</sup> *United Mine Workers v. Illinois Bar Ass'n*, *supra* note 25 at 223 n. 25.



tect speech and assembly only in the context of unions or other membership associations. Further, the solicitation in the *Button* case was not limited to members of the NAACP.

On the same day that *Goldfarb* was decided, the Supreme Court handed down an opinion in *Bigelow v. Virginia*,<sup>30</sup> a case that has not attracted as much attention as *Goldfarb* in connection with advertising and solicitation by lawyers but that is of far greater significance. In *Bigelow*, the defendant was convicted of violating a provision of the Virginia anti-abortion statute by publishing an advertisement offering to make low-cost arrangements for legal abortions in New York. The importance of the *Bigelow* case to the issue of advertising by lawyers is emphasized by the similarity between arguments typically made in support of the anti-advertising provisions of the Code and the arguments made by the Virginia Supreme Court in affirming *Bigelow*'s conviction. That court held that the advertisement "clearly exceeded in informational status" and "constituted an active offer to perform a service, rather than a passive statement of fact."<sup>31</sup> In rejecting *Bigelow*'s First Amendment claim, the Virginia court said that a "commercial advertisement" "may be constitutionally prohibited by the state," particularly "where, as here, the advertising relates to the medical-health field," i.e., a professional area in

<sup>30</sup> 421 U.S. 809 (1975).

<sup>31</sup> See *id.* at 814.

which the state's regulatory power presumably would be at its maximum. In addition, the court noted that the purpose of the statute was to insure that pregnant women in Virginia, making decisions with respect to abortions, did so "without the commercial advertising pressure usually incidental to the sale of a box of soap powder."<sup>32</sup> Those of course, are precisely the kinds of arguments that are made in support of regulations against advertising by lawyers.

Significantly, in striking down the Virginia statute on First Amendment grounds, the Supreme Court relied on *NAACP v. Button* for the proposition that a state cannot foreclose the exercise of constitutional rights simply by labeling the speech "solicitation" or "commercial advertising."<sup>33</sup> In the course of reaching that conclusion, the Court severely restricted, if it did not overrule, *Valentine v. Chrestensen*,<sup>34</sup> which had suggested that commercial advertising was not fully protected by the First Amendment.<sup>35</sup>

Finally, the Court made a strong bridge between the protected advertising in *Bigelow* and advertising by lawyers, by stressing the fact that the *Bigelow* advertisement contained information about legal issues:

"Viewed in its entirety, the advertisement conveyed information of potential interest and value

<sup>32</sup> *Ibid.*

<sup>33</sup> See especially *id.* at 826.

<sup>34</sup> 316 U.S. 52 (1942).

<sup>35</sup> 421 U.S. at 819-21 and especially n. 6.



to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia. . . . Also, the activity advertised pertained to constitutional interests. . . . Thus, in this case, appellant's First Amendment interests coincide with the constitutional interests of the general public."<sup>36</sup>

Thus, the *Bigelow* advertisement was given First Amendment protection expressly because it was directed to a "diverse audience" (not just the membership of an association), conveying information to those with a "general curiosity about, or genuine interest in . . . the law . . . and its development. . . ." Presumably, that same language would be descriptive of any advertisements offering legal services. Moreover, the reference in the *Bigelow* advertisement to the fact that abortions are legal in New York was made only in passing. Certainly the communication of legal information ("Abortions are legal in New York") was quite limited, and there was no explicit suggestion of the desirability of law reform. In the same sense, therefore, any advertisement relating to the availability of legal services would convey information of "potential interest and value" to people having a "general curiosity" about the law, its development, or law reform.

<sup>36</sup> *Id.* at 822.

It seems abundantly clear, therefore, that the present provisions of the Code of Professional Responsibility, forbidding advertising and solicitation by lawyers, are constitutionally invalid. Accordingly, it is appropriate, if not urgent, that we undertake the task of redrafting Canon 2.

In an earlier effort to that end, a draft of proposed amendments was circulated to the members of the Legal Ethics Committee of the District of Columbia Bar (as well as to the Subcommittee on Professional Responsibility of the Society of American Law Teachers).<sup>37</sup>

One concern expressed in response to that draft is that advertising by lawyers may prove to be "undignified" in some instances. The concern is a legitimate one. The appearance of justice, though not as important as the substance of it, is a matter of legitimate concern. If lawyers conduct themselves in an undignified way, the law itself may, to that extent, lose the appearance of dignity. On the other hand, a disciplinary standard that would require dignity and yet withstand constitutional attack may be impossible to achieve. In reversing a conviction in a rather extreme case of undignified expression ("Fuck the Draft"), Mr. Justice Harlan observed

<sup>37</sup> The author of that draft and principal author of the current proposal and of this statement is Monroe H. Freedman, Dean of the Hofstra Law School and Chairman of the Legal Ethics Committee and of the SALT Subcommittee on Professional Responsibility. The text of the draft appears in the *New York Law Journal*, p. 1, May 28, 1975.

that "One man's vulgarity is another's lyric."<sup>38</sup> "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms,"<sup>39</sup> and standards like "undignified" or "in good taste" clearly cannot meet that test.

Although it would not be feasible to draft a Disciplinary Rule forbidding lawyers to be undignified, the structure of the Code does permit the expression of aspirational guides in the Ethical Considerations. Accordingly, the draft proposed here does urge in the Ethical Considerations that "lawyers should strive to provide information to the public in ways that comport with the dignity of the profession and that do not tend to demean the administration of justice."

Since the earlier proposed redraft of Canon 2 would have imposed no prohibition on advertising and solicitation other than to forbid false and misleading representations, comments also expressed concern with a variety of offensive kinds of conduct that might result. For example, police officers might hand out lawyers' cards at the scenes of accidents.<sup>40</sup> Accident victims, strapped into stretchers, might be importuned by hospital orderlies to retain particular lawyers. Lawyers or their representatives might in-

<sup>38</sup> *Cohen v. California*, 403 U.S. 15 (1971).

<sup>39</sup> *NAACP v. Button*, *supra* note 19 and 438.

<sup>40</sup> Interestingly, one member of the Subcommittee on Professional Responsibility, objecting to individual advertising, suggested as a desirable alternative that police officers might be required to distribute institutional advertising about legal services at accident scenes.

interrupt funeral services to solicit probate work. People might be solicited through unwanted telephone calls or visits at home. And so on.

Those concerns also are legitimate, and an effort should be made to deal with them. However, that effort should not consist of prohibitions on communications by rules that are broader than necessary to serve the legitimate governmental purpose. As the Supreme Court observed in *Shelton v. Tucker*:<sup>41</sup>

"In a series of decisions this Court has held that even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."

Certainly it is not necessary to impose a broad ban on advertising and solicitation by lawyers in order to deal with such cases as the hospital orderly or the police officer. For example, if it is inappropriate for an orderly to solicit legal business (or, indeed, to speak to a patient at all, other than as required by the performance of hospital duties) hospitals can, and presumably do, issue appropriate directives to their employees. It would seem entirely appropriate, therefore, to discipline a lawyer who knowingly induced a breach of such an obligation by an orderly or by a police officer or any other employee. Simi-

<sup>41</sup> 364 U.S. 479, 488 (1960).



larly, a lawyer could be disciplined for soliciting business in a cemetery or any place else where business activity may be generally forbidden.

The appropriate approach to dealing with such cases, as well as with those cases involving harassing telephone calls or unwelcome visits to homes, is suggested in four Supreme Court decisions involving closely analogous situations. The first case is *Martin v. Struthers*.<sup>42</sup> There the Court invalidated a city ordinance that made it unlawful for any person distributing handbills, circulars or other advertising matter to ring a door bell or otherwise summon a householder to the door. The Court recognized a legitimate governmental interest in such a prohibition since "burglars frequently pose as canvassors, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later."<sup>43</sup> The Court held, however, that the right of freedom of speech and press embraces not only the right to distribute literature, but also necessarily protects the right to receive it.<sup>44</sup> Moreover, the city could have used a less drastic means to achieve its end, and one that would not have impinged upon those First Amendment rights:

<sup>42</sup> 319 U.S. 141 (1943).

<sup>43</sup> *Id.* at 144.

<sup>44</sup> *Id.* at 143.

"The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive these strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas."<sup>45</sup>

That is, the ordinance "substitute(d) by judgment of the community for the judgment of the individual householder," subjecting the distributor to criminal punishment for annoying another person "even though the recipient of the literature . . . is in fact glad to receive it."<sup>46</sup> The Court noted, however, that its holding did not prevent the city from punishing those who call at a home "in defiance of the previously expressed will of the occupant."<sup>47</sup> Supreme Court in *Breard v. Alexandria*,<sup>48</sup> a decision written by Mr. Justice Reed, who had dissented in *Martin*. In *Breard* the ordinance restricting door-to-door solicitation was directed against those who failed to obtain the prior consent of the owners of the residences solicited. Thus the legislative standard in *Breard* did not meet the test established in *Martin*, because the Court in *Martin* would have required an "explicit command from the owners to stay away."<sup>49</sup> How-

<sup>45</sup> *Id.* at 147.

<sup>46</sup> *Id.* at 144.

<sup>47</sup> *Id.* at 148.

<sup>48</sup> 341 U.S. 622 (1951).

<sup>49</sup> 319 U.S. at 148.

*Martin v. Struthers* appeared to be severely limited in the subsequent decision of the



ever, in dealing with the First Amendment aspect of the case, Justice Reed distinguished *Martin v. Struthers* expressly on the ground that that case had involved the distribution of leaflets advertising a religious meeting, whereas the defendant in *Breard* had been selling magazines. The selling, Justice Reed said, "brings into the transaction a commercial feature."<sup>50</sup> Emphasizing that point, he noted that the Court in *Martin* had directed attention to the fact that the ordinance there had not been aimed "solely at commercial advertising."<sup>51</sup> Thus, insofar as *Breard* appeared to represent a retreat from the Court's position in *Martin v. Struthers*, it was based expressly upon the notion that "commercial speech" is not entitled to full constitutional protection. As indicated in the discussion above, that idea has recently been decisively rejected by the Supreme Court in *Bigelow v. Virginia*.<sup>52</sup>

Even before the rejection of *Valentine v. Chrestensen* in *Bigelow*, a standard similar to that approved in *Breard* was unanimously struck down by the Court. The case of *Lamont v. Postmaster General*<sup>53</sup> involved a federal statute that permitted the Post Office to hold "communist political propaganda" arriving from abroad, unless the addressee requested delivery. The Supreme Court invalidated that statute

<sup>50</sup> 341 U.S. at 642.

<sup>51</sup> *Ibid.*

<sup>52</sup> See *supra* at pp. 14-17.

<sup>53</sup> 381 U.S. 301 (1965).

on the ground that it abridged the addressees' First Amendment rights by burdening the exercise of those rights with an affirmative obligation on the part of the addressee. By contrast, in *Rowan v. Post Office*<sup>54</sup> the Supreme Court upheld a statute that did not interpose the Postmaster General between the sender and the addressee but, rather, established a procedure whereby the householder could reject certain mailings in advance. Chief Justice Burger, writing for a unanimous Court, quoted with approval from *Martin v. Struthers* in holding that the freedom to distribute information to every citizen can only be limited if the power to prevent a distributor from calling at the home is left with the [sic].

~~*Martin v. Struthers* appeared to be severely limited in the subsequent decision of the individual homeowner.~~ On that authority, the statute in *Rowan* was upheld because "the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer."<sup>55</sup> Thus, in *Lamont* and *Rowan*, *Breard* was ignored and the rule of *Martin v. Struthers* was applied.

The proposed amendments to Canon 2 take their cue from those decisions. A community, or professional, judgment is not substituted for that of the individual citizen as to whether solicitation is de-

<sup>54</sup> 397 U.S. 728 (1970).

<sup>55</sup> *Id.* at 737.

sirable. Rather, a lawyer would be subject to professional discipline for soliciting a potential client only after that person has given the lawyer notice that he or she does not want to receive communications from the lawyer.

In sum, then, the proposed redraft of Canon 2 would (a) eliminate the general proscription against advertising and solicitation, but would (b) urge lawyers to advertise in a dignified manner, (c) forbid lawyers to solicit in ways that would violate valid laws or regulations, or that would involve the breach of a contractual or other legal obligation of the person through whom the lawyer seeks to communicate (e.g., a hospital attendant or police officer), and (d) further forbid lawyers to solicit anyone who has made it clear that he or she would prefer to be left alone. That approach, it is submitted, is pursuant to the need to ensure access to legal services by providing adequate information to the public and is consistent with the requirements of the First Amendment.

## DISSENT TO REPORT AND RECOMMENDATIONS

BY S. WHITE RHYNE, JR.

The Legal Ethics Committee has proposed a drastic revision of the rules of conduct under Canon 2 of the Code of Professional Responsibility. Just how drastic the revision really is can be seen from the following hypothetical examples of lawyer conduct, all of which would be permissible without disciplinary action under the proposed new rules:

**Lawyer A** employs an agent to cruise the city in a car equipped with a police radio. The agent drives to the scene of automobile accidents and attempts to persuade accident victims or their families to retain Lawyer A. The agent is instructed by Lawyer A to try to get signatures on retainer contracts at the scene.

**Lawyer B** employs an agent to call on the families of decedents whose names appear in newspaper obituaries or are supplied by morticians to whom the lawyer pays a commission. The agent carries retainer contracts for estate work.

**Lawyer C** has an office with his name and the words "Attorney at Law" in the front window in two-foot-high flashing neon letters. On top of the building is a billboard with a picture of the blindfolded goddess "Justice," holding scales in one hand a large illuminated dollar sign in the other. Beneath the picture is the legend, "Lawyer C for Big Judgments." On weekends, C's employees walk the streets,

handing out balloons and bumper stickers with the same legend, and an airplane writes it in the sky. Lawyer C later begins practicing under the trade name, "Big Judgments, P.C."

The Law Firm of D and E advertises: "You saw your doctor and you still hurt? See us and perhaps we can help relieve the pain. Our prescriptions can restore your wealth if not your health." On radio and television, the same message is preceded by a dulcet voice crooning "Zap your M.D., hire D and E."

The Law Firm of F, G and H promotes itself with the motto, "Prestige for Particular People." Its advertisements, mostly on the financial pages of local newspapers and in programmes at the Kennedy Center, depict the distinguished-looking senior partner in a vested suit sitting in his walnut pannelled, handsomely appointed office, chatting with various smiling clients. Several volumes of the Supreme Court Reports are always at his elbow.

These examples are cited only as possibilities. The manner and style of individual efforts at advertising and solicitation could be as diverse as the 20,000 members of the D.C. Bar. The point is not what most will do but what some may do. Because the Code prescribes what is permissible, a judgment as to whether or not a change in the Code would serve the public interest cannot be made without a full awareness of the extreme range of what the change would permit.

I share the concern of the majority of the Committee with opening up the channels of communication so that the public will have what the Committee report describes as "adequate information about the availability and cost of legal services." I don't think that removing the proscriptions on advertising and solicitation by lawyers is a desirable, appropriate or even a particularly effective way of achieving that objective. It should be noted, for instance, that not one of the examples of permissible lawyer conduct set out above involves the communication of any information to the public which is necessary or relevant to the selection of a lawyer.

#### Principal Reasons for Opposition

There are four principal reasons, all grounded in the public interest, why I am opposed to removing the proscriptions on lawyer advertising and solicitation. Two are mainly philosophical and two are practical. I shall state the philosophical reasons first because they seem to me to go to the heart of how one views the role of a lawyer, both in relationship to clients and as a participant in the process of administering justice.

First, advertising and solicitation seem to me to be basically inconsistent with professionalism. Professionals hold themselves out as willing to serve. When they step from that passive posture into a role of actively trying to attract business for profit, they appear to be and are self-seeking. Client confidence in their professionalism is eroded, and the



manner in which they perceive their own role may also be affected.

Granted, there are business aspects to the practice of law as there are professional aspects to the rendition of services by many businessmen. Lawyers who do not follow good business practices may not be practicing their profession for very long. Nevertheless, the practice of law should still be regarded primarily as a service to people and not as a business for profit. There are countless instances where considerations of personal profit run counter to considerations of client welfare, and where the client must depend on the lawyer's professionalism in putting the client's interests first. Clients, and lawyers too, must always know that this type of selfless professionalism is what is expected of lawyers. Introduction of commercial marketing practices common to the business world will tend to obscure the very real distinction between the practice of law as a profession and the carrying on of business.

Some say the present provisions of the Code on advertising and solicitation merely cause lawyers to be devious rather than direct in promoting themselves with prospective clients. Certainly there are instances now of client solicitation by lawyers, from courtroom hallways to country club greens. However, that is no reason to abandon provisions of the Code which are honored by most reputable lawyers. The Code should proclaim standards of good professional conduct, not those of the lowest common denominator.

A second fundamental reason why I oppose removing the proscriptions on advertising and solicitation is that it will open the door to practices which are undignified. I refer here to dignity in the process of administration of justice and not to dignity of lawyers as a group. The selection of a lawyer is an essential step in the process of the administration of justice. For some people, it is the most important step. It should not take place in an aura of "hucksterism" such as surrounds the marketing of soap powder. The right to counsel does not commence in the courtroom, and neither should basic decorum of counsel in fulfilling their vital role in the administration of justice.

The Committee's proposal recognizes the desirability of maintaining dignity by providing in an "ethical consideration" (as opposed to a "disciplinary rule") that "lawyers should strive to provide information to the public in ways that comport with the dignity of the profession and that do not tend to demean the administration of justice." However, the proposal recognizes that this admonition is an "aspirational guide" only. It would not be subject to enforcement in a disciplinary proceeding, no matter how flagrantly or frequently it might be violated.

The third reason I oppose advertising and solicitation by lawyers is that they encourage people to select lawyers for the wrong reasons—reasons not related to the competence and integrity of the lawyer being selected. For instance, advertising may encourage people to select lawyers because of "name-

recognition," or "image." Both can be created by advertising, as every political candidate knows. Image and name-recognition—not the dissemination of information—often seems to be the primary functions of commercial as well as political advertising. See, e.g., ads for Marlboro cigarettes (image) and the "Goodyear Blimp" (name-recognition).

Solicitation may encourage people to select lawyers on the basis of who gets there first, or who makes the most attractive sales pitch. The Committee majority, in citing *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), argues that antitrust considerations support removal of the Code proscriptions on advertising and solicitation. *Goldfarb*, of course, dealt with price-fixing and not with advertising or solicitation. Moreover, dropping the bars on client solicitation is not necessarily pro-competitive. Where practices of client-solicitation permit an aggressive lawyer to lock up an unsophisticated client with an early retainer contract, those practices are actually anti-competitive. Such a client is foreclosed from price-shopping or any other investigation of possible alternatives to the services of the lawyer who made the "early bag."

Even price-shopping is not the best way of selecting a lawyer, though I believe clients should be provided with the information necessary to do that if they wish; and, at certain economic levels, it may be essential to obtaining needed legal services. However, the best way of selecting a lawyer is and always has been on recommendations from satisfied clients, at-

torneys and others with knowledge of the lawyer's competence and integrity.

Whether this process operates in a corporate board room or in a neighborhood civic association or storefront church, it remains the way that most clients are most likely to find lawyers who will serve them well. Commercial advertising and solicitation may distort that process by encouraging the selection of lawyers for other reasons, and by making it possible for lawyers who are not competent and do not enjoy a good reputation nonetheless to subsist through the type of "one-time client" that advertising and solicitation can provide.

Fourth, I oppose removing the proscription on solicitation because it may result in harassment of members of the public. The Committee recognized that possibility and inserted in an earlier draft of the proposed new disciplinary rules the language which now appears in proposed DR 2-104: "A lawyer shall not solicit a potential client who has given the lawyer adequate notice that he or she does not want to receive communications from the lawyer."

However, that does not solve the problem. It merely tells the lawyer not to be persistent. Any lawyer is entitled to one try, even if it happens to be the tenth approach by a lawyer that day. The proposed rule does not even protect the public against the single solicitation which is so out-of-taste as to be annoying by its very nature, such as an approach to the bereaved at a funeral home.



In summary, therefore, I oppose removing the prescriptions on lawyer advertising and solicitation because such activities are inconsistent with professionalism, because they demean the process of administration of justice, because they encourage members of the public to select lawyers for the wrong reasons and because, in the case of solicitation, they may result in harassment of members of the public. I think these public interest detriments would be offset by few if any public interest benefits. There is some prior experience to support this view.

#### THE PATENT LAW EXPERIENCE

At the public hearing conducted by the Legal Ethics Committee, a statement opposing the proposed changes was made by a representative of the Steering Committee of Division XIV (Patent, Trademark and Copyright) of the D.C. Bar. That statement brought to the attention of the Ethics Committee the fact that advertising by patent practitioners had been permitted by the Commissioner of Patents until 1959. The experience was so unsatisfactory that, after extensive hearings and briefs and arguments by interested parties, the Patent Office adopted a rule which is currently in effect barring "the use of advertising, circulars, letters, cards and similar material to solicit patent business, directly or indirectly."

The patent experience was that only 2% of 6,700 practitioners chose to advertise. Statements by three

former Commissioners of Patents at the public hearings leading to the 1959 rule revision indicated that the services rendered by the advertisers were of poorer quality and more expensive than those rendered by other practitioners, and more frequently occasioned client complaints. Tr. 188, 191, 196, 197, attached as Exhibit 3 to Division XIV statement. I believe we should profit from the patent law experience, and not regress to a system that has been proved in practice to be contrary to the public interest.

#### ANTITRUST CONSIDERATIONS

Prominent in the majority report of the Ethics Committee are references to the recent Supreme Court decisions in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and *Bigelow v. Virginia*, 421 U.S. 809 (1975). The *Goldfarb* case, dealing with applicability of the Sherman Antitrust Act, is simply inapplicable to the Code of Professional Responsibility as it regulates the practice of law in the District of Columbia. The Court recognized in its opinion that the Sherman Act "was intended to regulate private practices and not to prohibit a State from imposing a restraint as an act of government." 421 U.S. at 788. See also *Parker v. Brown*, 317 U.S. 341 (1943).

The Code of Professional Responsibility is promulgated in this jurisdiction by the D.C. Court of Appeals, exercising delegated legislative power. See 11 D.C. Code § 2501 and Rule X of the Court. That is



clearly state action. The proscriptions under Canon 2 will not change until the D.C. Court of Appeals adopts the change. The Court will undoubtedly consider thoughtfully any recommendations for change from the D.C. Bars, as it should. However, the final decision will be made by the Court.

The Legal Ethics Committee received a statement at its public hearing from the Steering Committee of Division II (Antitrust, Trade Regulation and Consumer Affairs) of the Bar. The representative of that Division, while supporting generally the Committee proposal, acknowledged that "court regulation in the District would overcome the Federal antitrust laws." Tr. 55.

In the follow-up letter, the Division II Steering Committee appeared to advocate retention of something like the provision in present DR 2-103(B) which says that, except for payments of fees to bar-sponsored lawyer referral services, "a lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client." That provision, along with most of the rest of the disciplinary rules under Canon 2, is eliminated in the Committee's proposed revision. The Committee proposal speaks to the matter of paying for recommendations only in instances where the activity violates a contractual or other legal obligation of the person hired as a solicitor—for instance, where the "capper" is a police officer or hospital attendant.

The Division II follow-up letter said that payments to cappers could be prohibited, consistent with the policies of the antitrust laws, "because they involve a payment which ultimately would be passed on to the public." Apparently advocating such a prohibition, the letter went on to say: "Foreclosing these practices would not appear to restrict competition between lawyers, but it would have the beneficial effect of insuring that the public not indirectly subsidize activities which cannot add to the value of legal services being offered." I don't see a difference between payments for solicitation and payments for advertising insofar as the likelihood of a cost-pass-through to consumers is concerned. Both kinds of payments have the potential for making the public subsidize activities which do not add to the value of legal services.

### CONSTITUTIONAL CONSIDERATIONS

The other recent Supreme Court case cited in the majority report, *Bigelow v. Virginia*, applied constitutional protection of free speech to commercial advertising. The case did not involve advertising or solicitation by lawyers. It did recognize that "[a]dvertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest." 421 U.S. at 826.

The Committee majority seems to find, in four earlier cases involving solicitation of clients for lawyers, an indication that the Court would—if faced with the question—rule that restrictions on lawyer

advertising and solicitation are unconstitutional. See *NAACP v. Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217 (1967); and *United Transportation Union v. Michigan Bar*, 401 U.S. 576 (1971).

That may or may not be true. I hope the Supreme Court is ultimately presented with the question and decides it, but I do not believe it has done so yet.

Three of the four cases cited by the majority (*i.e.*, all but the *NAACP* case) involved solicitation directed by organizations at their own members, as part of a group legal services plan. In none of those cases did lawyers themselves take part in the solicitation nor did lawyers make any payment to the solicitors.

In the only case which involved participation by lawyers themselves in activities of solicitation or which involved solicitation outside the membership of the sponsoring organization, the services were rendered free to the clients. *NAACP v. Button*, 371 U.S. at 420, 440 n.19. Moreover, that case involved a state antisolicitation statute specifically tailored by amendment to curb civil rights litigation and found by the Court to have the potential for "smothering" such exercise of lawful activity on behalf of an "unpopular minority." *Id.* at 423-25, 434-36. No such reprehensible purpose or application lies behind the Code of Professional Responsibility as adopted in the District of Columbia.

The Supreme Court case which comes closest to deciding the question of the constitutionality of bans on lawyer advertising is *Semler v. Oregon State Board*, 294 U.S. 608 (1935). There the Court upheld the constitutionality of a state statute which made dentists subject to revocation of license for "advertising professional superiority or the performance of professional services in a superior manner."

Granted the case is forty years old, it was cited without disapproval in both *Goldfarb* and *Bigelow*. 421 U.S. at 792 and 825. The Court in the latter case said specifically that it was not deciding "the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate," and that its decision was "in no way inconsistent with our holdings in the Fourteenth Amendment cases that concern the regulation of professional activity." 421 U.S. at 825. *Semler* was cited as one of the cases upholding state regulation of professional activity.

While free speech policy considerations advanced by the Supreme Court in the cases cited by the Committee are relevant to what it has proposed, and no restriction on speech is ever to be taken lightly, the majority vastly overstates its case in asserting that it is "abundantly clear . . . that the present provisions of the Code of Professional Responsibility, forbidding advertising and solicitation by lawyers, are constitutionally invalid." The determination by the Bar (and ultimately by the Court of Appeals) of what is in the public interest as to lawyer advertising and



solicitation has not been foreclosed by constitutional decisions of the Supreme Court. Rather, such a determination has been mandated by the Supreme Court, which called in *Bigelow* for a "balancing" of competing interests—"assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Id.* at 826.

On one free speech point, I am in total agreement with the majority. I do not believe that regulation of lawyer advertising or solicitation based on a standard of what is "dignified" or "in good taste" would be either practical or constitutional. If the door once opened, we shall have to take the bad with the good. In that regard, it should be noted that a number of witnesses at the public hearing who supported removing the ban on lawyer advertising and solicitation joined their support with simplistic statements to the effect that of course such activities should not be conducted in such a manner as to be undignified or irritating to the public. It is just not that simple.

### THE BASIC PROBLEM

The Legal Ethics Committee is correct in its recognition that there are major problems in the District of Columbia, as elsewhere in the nation, in making possible the delivery of affordable legal services to persons of moderate income and modest assets. People have legal problems, as they have medical problems, which quickly outrun their ability to pay.

I don't agree with the Committee majority in its conclusion based on a study in Johnson City, Tennessee, that most people have an exaggerated idea of lawyers' charges. I believe that legal services, like medical services, are expensive and people know it. That is particularly true in an area like the District of Columbia where the overhead costs associated with practicing law are high.

The majority is correct in stating that the "axiomatic norm" of Canon 2 is that the legal profession has a duty to try to do something about this. While it is doubtful that the problem can be solved in the long run without public funds, that does not relieve the bar of its responsibility. Part of the reason for the recent movement for removing the proscriptions on advertising and solicitation by lawyers is that the legal profession has not done all it should do in carrying out its duty under Canon 2. Individual lawyers have not done all they should do in meeting the personal ethical obligation placed on each of them by Canon 2—To "Assist the Legal Profession in Fulfilling Its Duty To Make Legal Counsel Available."

This is changing, however. Bar-sponsored or bar-endorsed group legal services plans and legal clinics are appearing. Prepaid legal insurance plans are developing. The bar is actively involved in experiments with certification of specialists, one result of which may be the lowering of costs of services by channeling similar legal problems to those most qualified to handle them efficiently. There is increased in-



terest across the country in making lawyer referral services more responsive to the needs of moderate income clients. These developments in the 1970's, aimed at serving middle and moderate income Americans, have followed equally commendable developments in the 1960's aimed primarily at serving indigents.

Nonetheless, it has remained impossible for lawyers to engage in any meaningful price competition, or for clients to enjoy the benefits of that type of competition, because the bar has not opened up the channels of communication between lawyers and clients as to fees. In some instances, through mandatory minimum fee schedules now ruled illegal, the bar has actively opposed price competition. That has foreclosed lawyers who have been able to achieve economies of operation, or who are willing and able to work for less remuneration themselves, from reaching their natural market—the consumer who must have a cheaper price in order to be able to afford a lawyer. This has happened at the same time that we have more young lawyers entering the profession than ever before, many of them unable to practice their chosen profession because of absence of employment opportunities.

#### ALTERNATIVE APPROACHES TO THE PROBLEM

Two current developments in the District of Columbia suggest ways of communicating information to the public about the availability and cost of legal

services without the evils arising from commercial advertising. First, the Lawyer Referral Services Committee of the D.C. Bar has recently proposed to the Board of Governors that the Bar initiate a "Lawyer Register." Lawyers participating in the service could list information relevant to clients in selecting an attorney, including fee information if they so chose, on a registration sheet which would be made available to members of the public at the Bar Offices and perhaps at other locations. The various registration sheets would be cumulated and cross-indexed in such categories as areas of concentration of practices, geographic location of office, and language fluencies. The service would be free to lawyers and members of the public. The instructions to the public on how to use the service would encourage contacts with other clients or attorneys for references before entering into a retainer agreement.

The Committee has proposed that the availability of the new service be vigorously promoted by the Bar through institutional advertising. Such advertising could and should include information to the public on how to recognize the need for professional legal help and when to seek a lawyer.

A second encouraging development is a recommendation to the Board of Governors by the Committee on Specialization that the Bar publish a "Lawyer Directory." Information about lawyers choosing to be listed would be published in the directory, including fee information. The charge to participating attorneys would be \$10 per listing, and the directory

would be sold at a nominal cost to members of the public.

In the case of both the Lawyer Register and the Lawyer Directory, the dissemination of information would be subject to the supervision of the appropriate Bar committee. The Legal Ethics Committee has already ruled that the Lawyer Register, operated by the Bar as a lawyer referral service, would comply with existing provisions of the Code of Professional Responsibility. If the Lawyer Directory does not also comply, any change in the Code necessary to permit its publication would be slight.

Reference should be made to the reports of those two committees for the details of their proposals. Neither of these proposed new services of the Bar is subject to the objections applicable to unrestricted lawyer advertising and solicitation. Both of them would achieve what commercial advertising and solicitation would not, maximum dissemination of information useful to a prospective consumer of legal services in the selection of a lawyer, at little or no cost to the lawyer wishing to disseminate that information. They would provide consumers of legal services with a device for comparing information as to all attorneys who wish to be considered in the comparison process, not just those attorneys who can afford to advertise and whose sales pitch happens to reach the client when the need for legal services is there.

The proposal of the Legal Ethics Committee as to advertising and solicitation, and the proposals of

these other two committees of the Bar for a Lawyer Register and a published Lawyer Directory, are not mutually exclusive. The Board of Governors may choose to endorse them all. However, I suggest the other two proposals as a more acceptable and effective way of addressing the concerns which prompted the report and recommendations of the Ethics Committee. At the very least, I would not venture into unrestricted commercialism without first seeing whether adequate information about the availability and cost of legal services cannot be communicated to the public by more moderate means.

## APPENDIX C

## DISCUSSION DRAFT

Proposed Amendments to Ethical Considerations and  
Disciplinary Rules of Canon 2 of the Code of  
Professional Responsibility

Prepared by the  
American Bar Association  
Standing Committee on  
Ethics and Professional Responsibility

December 6, 1975

## Background

The Canons of Professional Ethics were first adopted by the American Bar Association in 1908. They were amended from time to time thereafter by the Association. On August 14, 1964, Lewis F. Powell, Jr., then President of the American Bar Association (now Associate Justice of the Supreme Court of the United States) created a Special Committee on Evaluation of Ethical Standards. The work of this Committee resulted in the development of the Code of Professional Responsibility which was adopted by the House of Delegates on August 12, 1969. Since that time the Code has been amended by the House of Delegates in 1970, 1974, and 1975.

The Standing Committee on Ethics and Professional Responsibility has held two open meetings to discuss the present limitations on advertising. The

first open meeting of the Committee was held on October 3, 1975 in Washington, D.C. for the purpose of hearing comments from predominantly non-lawyer national organizations. The second open meeting was held November 1, 1975 in Chicago, Illinois for the purpose of hearing comments from the bench and bar. All Section and Committee chairmen of the American Bar Association were invited as were the presidents of all Bar Associations represented in the House of Delegates of the American Bar Association.

The amendments prepared for discussion are the outgrowth of study by the Committee and discussion within the profession of the ethical issues bearing on communications to the public about the availability of lawyers' services. The amendments reflect comments submitted to the Committee at hearings by lawyers, lawyers' organizations, legal service organizations and consumer organizations. In preparing the Discussion Draft, the Committee carefully considered the recent decisions of the Supreme Court in the *Bigelow* and *Goldfarb* cases.

## Comments on Discussion Draft

## Canon 2 reads as follows:

"A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

Historically, the profession has believed that advertising by lawyers was neither required nor appropriate to fulfill its responsibilities under this



Canon. However, in the context of contemporary society, particularly with respect to its metropolitan characteristics in a service-oriented economy, the continued validity of these beliefs has been questioned by some. The draft amendment would permit advertising by lawyers, unless the material contains "a false, fraudulent, misleading, deceptive or unfair statement or claim." The draft Disciplinary Rules define such a statement as one which:

- "(1) contains a misrepresentation of fact;
- "(2) is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;
- "(3) contains a client's laudatory statements about a lawyer;
- "(4) is intended or is likely to create false or unjustified expectations of favorable results;
- "(5) implies unusual legal ability, other than as permitted by DR 2-105;
- "(6) relates to legal fees other than a standard consultation fee or a range of fees for specific types of services without fully disclosing all variables and other relevant factors;
- "(7) conveys the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;
- "(8) is intended or likely to result in a legal action or a legal position being taken or asserted merely to harass or maliciously injure another;

- "(9) is intended or is likely to appeal primarily to a lay person's fears, greed, desires for revenge, or similar emotions;
- "(10) contains other representations or implications that in reasonable probability will cause an ordinary, prudent person to misunderstand or be deceived."

Consistent with the foregoing Draft Disciplinary Rules, the Committee has drafted changes in the Ethical Considerations of Canon 2, particularly EC 2-8 and EC 2-8A, which read as follows:

"EC2-8. Selection of a lawyer by a lay person should be informed. Advice and recommendations of third parties—relatives, friends, acquaintances, business associates, or other lawyers—and proper publicity may be helpful. Advertisements and public communications, whether in law lists, announcement cards, newspapers or other forms, should be formulated to convey only information that is necessary to make an appropriate selection. Self-laudation should be avoided. Information that may be helpful in some situations would include: (1) office information, e.g., name, including name of law firm and names of professional associates; addresses; telephone numbers; and office hours; (2) biographical data; and (3) description of the practice, e.g., one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; and a statement that the lawyer or law firm specializes in a particular field of law or law practice but only if authorized by the

rules of the authority having jurisdiction under state law over the subject of specialization.

"The proper motivation for commercial publicity by lawyers lies in the need to inform the public of the availability of competent, independent legal counsel. The public benefit derived from advertising depends upon the usefulness of the information provided to the community or to the segment of the community to which it is directed. Advertising marked by excesses of content, volume, scope or frequency, or which unduly emphasizes unrepresentative biographical data, does not provide that public benefit. For example, undue prominence should not be given to a prior governmental position outside the context of biographical information. Similarly, the use of media whose scope or nature clearly suggests that the use is intended for self-laudation of the lawyer without concomitant benefit to the public does not serve the public need. Improper advertising may hinder informed selection of competent, independent counsel, and advertising involving excessive cost may unnecessarily increase fees for legal services.

"EC2-8A. Advertisements and other public communications should make it apparent that the necessity and advisability of legal action depends on variant factors that must be evaluated individually. Fee information usually will be incomplete and misleading to a lay person. Therefore, public communications should not attempt to give fee information beyond a statement of a standard consultation fee, a statement of a range of fees for specific types of

legal services, and the availability of credit arrangements. Because of the individuality of each legal problem, public statements regarding average, minimum or estimated fees normally will be deceiving as will commercial publicity conveying information as to results previously achieved, general or average solutions, or expected outcomes. For example, it would be misleading to advertise a set fee for a divorce case without disclosing the fact that the particular lawyer will not accept employment by every potential client for that fee. Advertisements or public claims that convey an impression that the ingenuity of the lawyer rather than the justice of the claim is determinative are similarly improper. Statistical data based on past performance or prediction of future success is deceptive because it ignores important variables. The context of factual assertions and opinions should be clearly evident in all public communications. It is improper to claim or imply an ability to influence a court, tribunal, or other public body or official by other than competent representation of a just cause. Commercial publicity and public communications should indicate the seriousness of undertaking any legal action. Not only must commercial publicity be truthful but its accurate meaning must be apparent to the lay person with no legal background. Any commercial publicity for which payment is made should so indicate."

The Discussion Draft would permit a lawyer to state that he is limiting his practice to a particular area or field of law or is concentrating his practice

in one or more particular areas of the law, providing that his statements are not misleading. It also would permit lawyers to indicate other degrees and professional licenses.

The Discussion Draft does not distinguish television, radio, newspapers, magazines, and direct mail advertisements. All paid advertisements must be identified as such.

The suggested amendments would not affect existing prohibitions of solicitation of clients by lawyers.

*Canon 2 \**

*A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available*

EC 2-1 \* \* \*

*Recognition of Legal Problems*

EC 2-2 The legal profession should assist lay[men] *persons* to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers [acting under proper auspices] should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. [Such educational programs should be motivated by a desire to benefit the public rather than to obtain publicity or employment for particular lawyers. Examples of permissible activities include] Preparation of [institutional] advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs *should be motivated by a desire to benefit the public in its awareness of legal needs and selection of the most appropriate counsel.* [but a lawyer who participates in such activities should shun personal publicity.]

EC 2-3 Whether a lawyer acts properly in volunteering advice to a lay[man] *person* to seek legal

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\* Additions italicized [Deletions Bracketed].



services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist lay[men] *persons* in recognizing legal problems. The advice is proper *whenever it is* [only if] motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. *It* [Hence, the advice] is improper if motivated by a desire to [obtain personal benefit, secure personal publicity, or] cause [litigation] legal action to be *taken brought* merely to harass or injure another. *A lawyer best serves the public if he does not volunteer advice in order to obtain private gain in regard to employment.* [Obviously] A lawyer should not contact a non-client, *personally or through a representative*, [directly or indirectly,] for the purpose of being retained to represent him for compensation.

EC 2-4 Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers advice that one should obtain the services of a lawyer [generally should not himself] *and who then* accepts employment, compensation, or other benefit in connection with that matter *gives at least the appearance of impropriety.* However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, rela-

tives, former clients (in regard to matters germane to former employment), and regular clients.

EC 2-5 A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems *and informing them of his services* should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for lay[men] *persons* should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

#### *Selection of a Lawyer [Generally]*

EC 2-6 \* \* \*

EC 2-7 Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable lay[men] *persons* to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many lay[men] *persons* have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of

limited education or means, and others who have little or no contact with lawyers. *Lack of information about the availability of lawyers and the expense of initial consultation have been said to lead lay persons to avoid seeking legal advice.*

EC 2-8 Selection of a lawyer by a lay person should be informed. [man often is the result of the] Advice and recommendation of third parties—relatives, friends, acquaintances, business associates, or other lawyers—and proper publicity may be helpful. [A layman is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations.] *Advertisements and public communications, whether in law lists, announcement cards, newspapers or other forms, should be formulated to convey only information that is necessary to make an appropriate selection. Self-laudation should be avoided. Information that may be helpful in some situations would include: (1) office information, e.g., name, including name of law firm and names of professional associates; addresses; telephone numbers; and office hours; (2) biographical data; and (3) description of the practice, e.g., one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more*

*fields of law; and a statement that the lawyer or law firm specializes in a particular field of law practice but only if authorized by the rules of the authority having jurisdiction under state law over the subject of specialization.*

*The proper motivation for commercial publicity by lawyers lies in the need to inform the public of the availability of competent, independent legal counsel. The public benefit derived from advertising depends upon the usefulness of the information provided to the community or to the segment of the community to which it is directed. Advertising marked by excesses of content, volume, scope or frequency, or which unduly emphasizes unrepresentative biographical data, does not provide that public benefit. For example, undue prominence should not be given to a prior governmental position outside the context of biographical information. Similarly, the use of media whose scope or nature clearly suggests that the use is intended for self-laudation of the lawyer without concomitant benefit to the public does not serve the public need. Improper advertising may hinder informed selection of competent, independent counsel, and advertising involving excessive cost may unnecessarily increase fees for legal services.*

EC 2-8A *Advertisements and other public communications should make it apparent that the necessity and advisability of legal action depends on variant factors that must be evaluated individually. Fee information usually will be incomplete and misleading*



to a lay person. Therefore, public communications should not attempt to give fee information beyond a statement of a standard consultation fee, a statement of a range of fees for specific types of legal services, and the availability of credit arrangements. Because of the individuality of each legal problem, public statements regarding average, minimum or estimated fees normally will be deceiving as will commercial publicity conveying information as to results previously achieved, general or average solutions, or expected outcomes. For example, it would be misleading to advertise a set fee for a divorce case without disclosing the fact that the particular lawyer will not accept employment by every potential client for that fee. Advertisements or public claims that convey an impression that the ingenuity of the lawyer rather than the justice of the claim is determinative are similarly improper. Statistical data based on past performance or prediction of future success is deceptive because it ignores important variables. The context of factual assertions and opinions should be clearly evident in all public communications. It is improper to claim or imply an ability to influence a court, tribunal, or other public body or official by other than competent representation of a just cause. Commercial publicity and public communications should indicate the seriousness of undertaking any legal action. Not only must commercial publicity be truthful but its accurate meaning must be apparent to the lay person with no legal background. Any

commercial publicity for which payment is made should so indicate.

[Selection of a Lawyer: Professional Notices and Listings]

EC 2-9 The traditional regulation of [ban against] advertising by lawyers [, which is subject to certain limited exceptions,] is rooted in the public interest. Competitive advertising [would encourage] through which a lawyer seeks business by use of extravagant, artful, self-laudatory [brashness] or brash statements or appeals to fears and emotions could mislead and harm the lay[man] person. Furthermore, [it] public communications that would [inevitably] produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers would be harmful to society. Thus, public confidence in our legal system would be impaired by such advertisements of professional services. The attorney-client relationship, being [is] personal and unique, [and] should not be established as a result of pressures or [and] deceptions. [History has demonstrated that confidence in the legal system is best preserved by strict, self-imposed controls over, rather than by unlimited, advertising.] The necessity of affording the public access to information relevant to legal rights has resulted in some relaxation of the former restrictions against advertising by lawyers. Those restrictions have long been relaxed in regard to law lists, announcement cards and institutional advertising and in certain other respects. Historically, those re-



*strictions were imposed to prevent deceptive publicity that would mislead lay persons, cause distrust of the law and lawyers, and undermine public confidence in the legal system, and all lawyers should remain vigilant to prevent such results. Only unambiguous information relevant to a layperson's decision regarding his legal rights or his selection of counsel is appropriate in public communications.*

EC 2-10 [Methods of advertising that are subject to the objections stated above should be and are prohibited. However, t]The Disciplinary Rules recognize the value of giving assistance in the selection process through forms of advertising that furnish identification of a lawyer while avoiding *falsity, deception, and misrepresentation*. All publicity should be evaluated with regard to its effect on the layperson with no legal experience. The layperson is best served if advertisements only identify the lawyer and his location, indicate any limitation of practice, contain no misleading fee information or emotional appeals, and emphasize the necessity of an individualized evaluation of the situation before conclusions as to legal needs and probable expenses can be made. The attorney-client relationship must result from a free and informed choice by the lay person. Unwarranted promises of benefits, overpersuasion, or vexatious or harassing conduct are improper. [such objections. For example, a lawyer may be identified in the classified section of the telephone directory, in the office building directory, and on his letterhead and profes-

sional card. But at all times the permitted notices should be dignified and accurate.]

EC 2-11 The name under which a lawyer conducts his practice may be a factor in the selection process. The use of a [trade name or an assumed] name which could mislead lay[men] persons concerning the identity, responsibility, and status of those practicing thereunder *is not proper*. [Accordingly, a lawyer in private practice should practice only under his own name, the name of a lawyer employing him, a partnership name composed of the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, in the name of a professional legal corporation, which should be clearly designated as such.] For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

EC 2-12 \* \* \*

EC 2-13 \* \* \*

EC 2-14 In some instances a lawyer confines his practice to a particular field of law. In the absence

of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist or as having *official recognition as a specialist*, [special training or ability,] other than [in the historically excepted] *the fields of admiralty, trademark, and patent law where holding one's self out as a specialist historically has been permitted*. A lawyer may, however, publicly indicate a limitation of his practice or a concentration in one or more particular areas or fields of law if the public announcement clearly reflects that the lawyer has not been officially recognized or certified as a specialist.

EC 2-15 \* \* \*

DR 2-101 [Publicity in General] *Publicity and Advertising.*

- (A) A lawyer shall not, [prepare, cause to be prepared,] *on behalf of himself, his partner, or associate, or any other lawyer affiliated with him or his firm, use[,]* or participate in the use of[,] *any form of public communication [that contains professionally self-laudatory statements calculated to attract lay clients;] containing a false fraudulent, misleading, deceptive or unfair statement or claim.* A [as used herein,] "public communication" as used herein includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, book, law list or legal directory, [magazine, or book]
- (B) A [lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affili-

ated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf. However, a lawyer recommended by, paid by or whose legal services are furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits. This rule does not prohibit limited and dignified identification of a lawyer as well as by name:

- (1) In political advertisements when his professional status is germane to the political campaign or to a political issue.
- (2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.
- (3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.
- (4) In and on legal documents prepared by him.
- (5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.
- (6) In communications by a qualified legal assistance organization, along with the bio-



graphical information permitted under DR 2-102(A) (6), directed to a member or beneficiary of such organization.]

*false, fraudulent, misleading, deceptive or unfair statement or claim include a statement or claim which:*

- (1) contains a misrepresentation of fact;*
- (2) is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;*
- (3) contains a client's laudatory statements about a lawyer;*
- (4) is intended or is likely to create false or unjustified expectations of favorable results;*
- (5) implies unusual legal ability, other than as permitted by DR 2-105;*
- (6) relates to legal fees other than a standard consultation fee or a range of fees for specific types of services without fully disclosing all variables and other relevant factors;*
- (7) conveys the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;*
- (8) is intended or likely to result in a legal action or a legal position being taken or asserted merely to harass or maliciously injure another;*
- (9) is intended or is likely to appeal primarily to a lay person's fears, greed, desires for revenge, or similar emotions;*
- (10) contains other representations or implications that in reasonable probability will*

*cause an ordinary, prudent person to misunderstand or be deceived.*

- (C) A lawyer shall not compensate or give anything of value to [representatives] a representative of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity [in a news item] *unless the fact of compensation is made known in such publicity.*

DR 2-102. Professional Notices, Letterheads, Offices and Law Lists.

- (A) A lawyer or law firm [shall *may* not use a professional card[s], professional announcement card[s], office sign[s], letterhead[s], telephone directory listing[s], law list[s], legal directory listing[s], or a similar professional notice[s] or device[s, except that the following may be used if they are in dignified form:

- (1) A professional card of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, and any information permitted under DR-2-105. A professional card of a law firm may also give the names of members and associates. Such cards may be used for identification but may not be published in periodicals, magazines, newspapers, or other media.
- (2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional office of a lawyer or law firm, which may be mailed to lawyers, clients, former clients,



personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105.

- (3) A sign on or near the door of the office and in the building directory identifying the law offices. The sign shall not state the nature of the practice, except as permitted under DR 2-105.
- (4) A letterhead of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, associates and any information permitted under DR 2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if he or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

- (5) A listing of the office of a lawyer or law firm in the alphabetical and classified sections of the telephone directory or directories for the geographical area or areas in which the lawyer resides or maintains offices or in which a significant part of his clientele resides and in the city directory of the city in which his or the firm's office is located; but the listing may give only the name of the lawyer or law firm, the fact that he is a lawyer, addresses and telephone numbers. The listing shall not be in distinctive form or type. A law firm may have a listing in the firm name separate from that of its members and associates. The listing in the classified section shall not be under a heading or classification other than "Attorneys" or "Lawyers," except that additional headings or classifications descriptive of the types of practice referred to in DR 2-105 are permitted.
- (6) A listing in a reputable law list or legal directory brief biographical and other informative data. A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the law-

yer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or law firm specializes in a particular field of law or law practice but only if authorized under DR 2-105(A)(4); date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; memberships in scientific, technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented.] *if it includes a statement or claim that is false, fraudulent, misleading, deceptive or unfair within the meaning of DR 2-101(B).*

- (B) A lawyer [in private practice] shall not practice under [a trade name,] a name that is misleading as to the identity, *responsibility or status of those* [of the lawyer or lawyers] practicing thereunder, *or is otherwise false, fraudulent, misleading, deceptive or unfair within the meaning of DR 2-101(B), or is contrary to law.* [under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that] *However, the name of*

a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of *or public communication by* the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of *or public communications by* the firm.

- (C) A lawyer shall not hold himself out as having a partnership with one or more other lawyers unless they are in fact partners.
- (D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listing make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.
- [(E) A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign or



professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.]

- [(F)](E) Nothing contained herein shall prohibit a lawyer from using or permitting the use of, in connection with his name, an earned degree or title derived therefrom indicating his training in law.

DR 2-103. Recommendation or Solicitation of Professional Employment.

- (A) A lawyer shall not recommend employment[,] or assist another person in recommending employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer[,] except that if success in asserting rights of defenses of his clients in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept employment from those he is permitted under applicable law to contact for the purpose of obtaining their joinder.

- [(C)] A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except that

- (1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.
- (2) He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103(D)(1)

through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

- (a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and
- (b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.]

- [(D)](B) A lawyer shall not knowingly assist [a person or] an organization that furnished or pays for legal services to others to promote the use of his services or those of his partner, or associate, or any other lawyer affiliated with him or his firm, [except as permitted in DR-2-101 (B)]. However, this does not prohibit a lawyer or his partner or associate or any other lawyer affiliated with him or his firm from being recommended, employed or paid by, or cooperating with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

- (1) A legal aid office or public defender office:
  - (a) Operated or sponsored by a duly accredited law school.
  - (b) Operated or sponsored by a bona fide non-profit community organization.
  - (c) Operated or sponsored by a governmental agency.
  - (d) Operated, sponsored, or approved by a bar association.



- (2) A military legal assistance office.
- (3) A lawyer referral service operated, sponsored, or approved by a bar association.
- (4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:
  - (a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.
  - (b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.
  - (c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.
  - (d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

- (e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal services plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.
- (f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.
- (g) Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.]

*as a private practitioner, if:*

- (1) *the promotional activity involves use of a statement or claim that is false, fraudulent, misleading, deceptive or unfair within the meaning of DR 2-101(B); or*
- (2) *the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct.*

[(B)] (C) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay for *publicity and advertising permitted by DR 2-101* and the usual and reasonable fees or dues charged by [any of the organizations listed in DR 2-103 (D).] *a lawyer referral service operated, sponsored, or approved by a bar association.*

[(E)] (D) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.

#### DR 2-104 Suggestion of Need of Legal Services.

- (A) A lawyer who has given unsolicited advice to a lay[man] *person* that he should obtain counsel or take legal action shall not accept employment resulting from that advice [, except that:
  - (1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

- (2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by a qualified legal assistance organization.
- (3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103 (D) (1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.
- (4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.
- (5) If success in asserting rights or defenses of his clients in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.]

*if:*

- (1) *The advice embodies or implies a statement or claim that is false, fraudulent, misleading, deceptive or unfair within the meaning of DR 2-101 (B); or*
- (2) *The advice involves the use by the lawyer of coercion, duress, compulsion, intimidation, threats, unwarranted promises of bene-*

*fits, overpersuasion, overreaching, or vexatious or harrassing conduct.*

DR 2-105. Limitation of Practice.

(A) A lawyer shall not hold himself publicly as, [a specialist or as limiting his practice, except as permitted under DR 2-102 (A) (6)] or *imply that he is, a recognized or certified specialist, except as follows:*

(1) A lawyer admitted to practice before the United States Patent Office may use the designation "Patents," "Patent Attorney," or "Patent Lawyer," or any combination of those terms, on his letterhead and office sign. A lawyer engaged in the trademark practice may use the designation "Trademarks," "Trademarks Attorney," or "Trademark Lawyer," or any combination of those terms, on his letter head and office sign, and a lawyer engaged in the admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or "Admiralty Lawyer," or any combination of those terms, on his letterhead and office sign.

[(2) A lawyer may permit his name to be listed in lawyer referral service offices according to the fields of law in which he will accept referrals.

(3) A lawyer available to act as a consultant to or as an associate of other lawyers in a particular branch of law or legal service may distribute to other lawyers and publish in legal journals a dignified announcement of such availability, but the announcement shall not contain a representation of spe-

cial competence or experience. The announcement shall not be distributed to lawyers more frequently than one in a calendar year, but it may be published periodically in legal journals.]

[(4)] (2) A lawyer who is certified as a specialist in a particular field of law or law practice by the authority having jurisdiction under state law over the subject of specialization by lawyers may hold himself out as such specialist but only in accordance with the rules prescribed by that authority.

(B) *A statement, announcement, or holding out as limiting practice to a particular area or field of law or as concentrating practice to one or more particular areas or fields of law does not constitute a violation of DR 2-105 (A) if the statement, announcement or holding out does not include a statement or claim that is false, misleading, deceptive or unfair within the meaning of DR 2-101 (B).*

\* \* \* \*

### Definitions

As used in the Disciplinary Rules of the Code of Professional Responsibility:

- (1) \* \* \*
- (2) \* \* \*
- (3) \* \* \*
- (4) \* \* \*
- (5) \* \* \*
- (6) \* \* \*



(7) "A Bar association" includes a bar association of specialists as referred to in DR 2-105 (A) (1) or [(4)] (2).

(8) "Qualified legal assistance organization" means [an office or organization of one of the four types listed in DR 2-103(D) (1)-(4), inclusive] *a legal aid, public defender, or military assistance office; a lawyer referral service; or a bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries, provided the office, service or organization receives no profit from the rendition of legal services, is not designed to procure financial benefit or legal work for a lawyer as a private practitioner, does not infringe the individual member's freedom as a client to challenge the approved counsel or to select outside counsel at client's expense, is not in violation of any applicable law, and has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan. [that meets all the requirements thereof.]*

## APPENDIX D

[SEAL] NEWS RELEASE

## THE STATE BAR OF CALIFORNIA

FOR IMMEDIATE RELEASE

September 20, 1976

FRESNO—Ralph J. Gampell, President-elect of the State Bar, told the Bar's Conference of Delegates today that proposed changes in Rules of Professional Conduct for lawyers would benefit the public by providing more useful information about what attorneys do.

He said a program the Bar's Board of Governors has recommended for adoption by the California Supreme Court is a carefully balanced proposal easing limitations on lawyer advertising which would better enable people to select attorneys to meet their needs. At the same time, he said, it would retain safeguards against false and misleading statements and abusive solicitation practices.

Gampell spoke in response to a request from the Conference yesterday that the Board withdraw its proposal for further modification.

Gampell pointed out that the Supreme Court must exercise its own independent judgment on the rule changes and he invited delegates, their local bars and any interested groups of individual to file their positions with the Court.

The new rules were adopted by the Bar's Board of Governors at their August meeting by a 12-3 vote.

Persons commenting upon or objecting to the specific rules proposed by the Board may file petitions and briefs in the Supreme Court in accordance with rule 952, subd. (c) of the California Rules of Court.

(Filed by the Clerk of the Court as *In the Matter of the Proposed Repeal of Rule 2-106, Rules of Professional Conduct* under Bar Misc. No. 3922.)

On August 26, 1976, subject to the approval of the Supreme Court of California, the Board of Governors repealed Rule 2-106 and adopted Rules 2-101, 2-102, 2-103 and 2-104, Rules of Professional Conduct, in the following form:

Rule 2-101 General Prohibitions Against Solicitation of Professional Employment.

(A) A member of the State Bar shall not solicit professional employment. By way of example but without limiting the prohibition:

(1) A member of the State Bar shall not solicit professional employment in or about any prison or jail or other place of detention of persons, or the scene of any accident, or any hospital or sanitarium or other place of health care, or any court, or any public institution, or any public place, or any public street or highway, or any private institution or property of any character whatsoever, either personally or by use of any other person, firm, association, partnership, corporation or other entity or instrumentality acting on the member's behalf in any manner or in any capacity whatsoever.

(2) A member of the State Bar shall not solicit professional employment by compensating or giving or promising anything of value to a person or entity for the purpose of recommending or securing the member's employment by a client, or as a reward for having made a recommendation resulting in the member's employment by a client.

(3) A member of the State Bar shall not solicit professional employment by compensating or giving or promising anything of value to any representative of the press, radio, television or other communication medium in anticipation of or in return for publicity of the member or any other attorney.

(4) A member of the State Bar shall not solicit professional employment by recommending employment of the member or the member's partner or associate to a non-lawyer who has not sought the member's advice regarding employment of a member of the State Bar.

(5) A member of the State Bar shall not solicit professional employment by advertisement or other means of commercial publicity nor shall the member authorize or permit others to do so in the member's behalf.

(B) A member of the State Bar shall not accept employment when the member knows or should know that the person who seeks the member's services does so as a result of conduct prohibited under (A) of this rule.

(C) This rule does not prohibit the following identification of a member of the State Bar as such as

well as by name and other reasonably pertinent data so long as such identification is not primarily directed to soliciting professional employment:

- (1) In political advertisements;
- (2) In public communications when the name and profession of a member of the State Bar are required or authorized by law or are reasonably pertinent for a purpose other than for the solicitation of potential clients;
- (3) In or on legal documents prepared by the member of the State Bar;
- (4) In routine reports and announcements of a bona fide business, civic, professional or political organization in which the member serves as a director or officer or other official capacity; and
- (5) In or on articles, books, treatises, pamphlets, brochures or other such publications and in advertisements thereof.

#### Rule 2-102. Public Information Communications.

(A) A member of the State Bar may participate in the publication of any of the information about the member or the member's firm specified in (B) (3) of this rule in any of the following:

- (1) Law lists and legal directories approved by the Board of Governors pursuant to the following criteria:
  - (a) The information published therein is substantially in the form and language specified in (B) (3) of this rule.
  - (b) Each such law list or legal directory is a separate collation which includes a rea-

sonable number of attorneys (from different sole law practices, law partnerships, professional associations of attorneys practicing law together or law corporations), considering the size of the legal community and the field or fields of law involved, listed together under the title "Attorneys" or "Lawyers" and under such additional subclassifications (including, but not limited to, geographical areas in which members reside or maintain offices or regularly practice, fields of law or certified specialists) as are not likely to be misleading or injurious to the public or the profession.

(c) Preferential prominence is not given to any member listed therein, by different size or character of type, underscoring or any other method used for emphasis or to attract attention.

(d) The information itself and the manner in which the information is presented or distributed (i) are not false, fraudulent, misleading, deceptive or unfair, (ii) are not likely to mislead or deceive, whether because in context they make only a partial disclosure of variables and relevant facts, or for other reasons, (iii) do not contain laudatory statements about the member or the member's firm, (iv) are not intended or likely to create false or unjustified expectations of favorable results, (v) do not convey the impression that the member or the member's firm is in a position to influence improperly any court, tribunal or other pub-



lic body or official, (vi) are not intended or likely to encourage a legal action or position being taken or asserted primarily to harass or maliciously injure another, (vii) are not intended or likely to appeal primarily to a person's fears, greed, desires for revenge or similar emotions, (viii) do not contain representations or implications that are likely to deceive or to cause misunderstanding, and (ix) are not for the primary purpose of obtaining professional employment of a particular member or member's firm for a specific matter or transaction.

(e) The law list or legal directory is published no more frequently than once quarterly.

(f) The law list or legal directory contains such explanatory information as the Board of Governors may prescribe from time to time for the protection of persons to whom the communications are addressed.

(g) The law list or legal directory clearly specifies for what period of time the information contained therein will be in effect.

(h) Law lists or legal directories may be published or distributed by commercial publishers of law lists or legal directories; bar associations; newspaper publishers; publishers of telephone directories; service clubs; charitable organizations; consumer organizations; labor unions; business, professional or trade associations; and entities enumerated in Rule 2-104, provided the person or entity publishing the law list or legal directory files with the State Bar a certifi-

cation that it will not arbitrarily, capriciously or unreasonably exclude any member of the State Bar from its law list or legal directory.

A member shall not participate in the publication of information about the member or the member's firm in any law list or legal directory which the member knows or should know does not comply with the requirements of this rule and has not been approved by the Board of Governors or has been subsequently disapproved by the Board of Governors. Applications for approval of law lists and legal directories shall be made on such forms and pursuant to such rules as adopted and as from time to time amended by the Board of Governors.

(2) Classified sections of the telephone directory or directories for the geographical area or areas in which the member of the State Bar resides or maintains offices or regularly practices law, provided:

(a) All listings of members and members' firms therein are in a separate collocation listed together under the title "Attorneys" or "Lawyers" and, if under subclassifications, are only arranged according to fields of law in which the member or the member's firm concentrates, primarily engages, or will accept cases, or in which the member is a certified specialist.

(b) The information permitted in (B) (3) of this rule is presented in substantially the form and language set forth therein.

(c) Introductory paragraphs or footnotes include such explanatory information as the Board of Governors may prescribe from time to time for the protection of persons to whom the communications are addressed.

(d) The presentation of the information does not violate the provisions of (1)(c) or (d) of (A) of this rule.

(3) Law lists or legal directories published periodically by the State Bar.

As used herein, "fields of law" include, but is not limited to, administrative agency law, admiralty or maritime law, antitrust law, (field(s) of) appellate practice, bankruptcy law, business law, (field(s) of) civil practice, civil rights law, condemnation law, contract law, copyright law, corporation and partnership law, creditor's rights law, criminal law, debtor's rights law, education law, employment law, entertainment law, environmental law, estate planning, family law, general practice, immigration and naturalization law, juvenile law, labor law, landlord and tenant law, (field(s) of) malpractice law, patent law, pension and profit sharing law, personal injury law, probate law, real estate law, senior citizens law, social security law, taxation law, trademark law, (field(s) of) trial practice, trust law, unemployment insurance law, veterans law, welfare law, worker's compensation law, zoning law.

(B) A member of the State Bar may participate in the publication of any of the information about the

member or the member's firm specified in paragraph (3) of this subdivision to the extent permitted in (A) of this rule and in Rules 2-103 and 2-104, provided:

(1) Both the information itself and the manner in which the information is presented or distributed (a) are not false, fraudulent, misleading, deceptive or unfair, (b) are not likely to mislead or deceive, whether because in context they make only a partial disclosure of variables and relevant facts, or for other reasons, (c) do not contain laudatory statements about the member or the member's firm, (d) are not intended or likely to create false or unjustified expectations of favorable results, (e) do not convey the impression that the member or the member's firm is in a position to influence improperly any court, tribunal or other public body or official, (f) are not intended or likely to encourage a legal action or position being taken or asserted primarily to harass or maliciously injury another, (g) are not intended or likely to appeal primarily to a person's fears, greed, desires for revenge or similar emotions, (h) do not contain representations or implications that are likely to deceive or to cause misunderstanding, and (i) are not for the primary purpose of obtaining professional employment of a particular member or member's firm for a specific matter or transaction.

(2) Only members who hold a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Board of Gov-

ernors may use the terms "certified specialist", "specialist", "speciality", "specializes" or "specializing" in describing themselves or the nature of their practice; and only members who are registered to practice in patent matters before the United States Patent and Trademark Office may use the words "patent" or "patents" in describing themselves or the nature of their practice.

(3) Such information is presented in substantially the following form and language:

(a) Name of the member of the State Bar;

*Form:* "[name of member]"

(b) Name under which the member practices, which may be accompanied by a statement clarifying that the practice is (i) a sole practice, (ii) a law partnership, (iii) an association of attorneys or (iv) a public interest law firm which has been ruled exempt from federal income tax under the Internal Revenue Code; provided that if the name under which the member practices is a law corporation, the statement clarifying that the practice is a law corporation shall be given and shall comply with the provisions of section 6164 of the Business and Professions Code;

*Form:* "[name of member's firm, e.g. 'Legal Clinic of Doe and Roe', 'Doe and Roe, Lawyers'], ['a sole practitioner' or 'a law partnership' or 'an association of attorneys' or 'a law corporation' or 'public interest law firm']"

(c) The name(s) of predecessor law firm(s) in a continuing line of succession;

*Form:* "formerly: [name(s) of predecessor law firm(s) listed in reverse chronological order]"

(d) Address(es) and telephone number(s) of the office(s) maintained by the member or the member's firm for the practice of law;

*Form:* "[address(es)], [telephone number(s)]"

(e) Office hours regularly maintained by the member or the member's firm for the practice of law, and a statement that the member is available to meet with clients or potential clients at times other than the specified office hours;

*Form:* "office hours: [days and hours regularly maintained], [and/or 'by appointment'] [telephone answered:] [days and hours regularly answered or '24 hours']"

(f) A statement that the member is (or is not) willing to meet with potential clients at locations other than the member's office(s);

*Form:* "interviews ['not'] limited to office(s)"

(g) Language(s) other than English spoken fluently by the member;

*Form:* "fluent in: [name(s) of language(s)]"



(h) Language(s) other than English for which the member or the member's firm provides interpreter(s), and a statement whether such interpreter(s) are provided without charge;

*Form:* "[ 'free' ] [name(s) of language(s)] interpreter(s) provided"

(i) Cost of an initial interview for a specified period of time, or a statement that such interview for a specified period of time is without charge;

*Form:* "initial interview: [ '1/2 hour' or '1 hour' or other specified period of time ], [dollar amount or 'free']"

(j) A statement that the member or the member's firm does (or does not) provide a written fee schedule, and if such fee schedule is provided a statement whether such fee schedule is provided without charge;

*Form:* "[ 'free' ] written fee schedule available"

(k) A statement that the member or the member's firm is (or is not) willing to provide written fee estimates for specific services prior to providing such services, and if such fee estimates are provided a statement whether such fee estimates are provided without charge;

*Form:* "[ 'free' ] written fee estimates given"

(l) Field(s) of law practiced by the member or the member's firm in which fees are set by statute;

*Form:* "[field(s) of law] fees set by statute"

(m) Hourly fee(s) or range of hourly fee(s) charged by the member or the member's firm, *together with* all of the variables and other relevant factors that could affect the amount(s) of the stated fee(s);

*Form:* "[ 'hourly fee(s), together with all variables and relevant factors ]: [dollar amount(s)]"

(n) Fee(s) or range(s) of fee(s) charged by the member or the member's firm for specific types of services, *together with* all of the variables and other relevant factors that could affect the amounts of the stated fee(s);

*Form:* "[type(s) of service(s), together with all variables and relevant factors]: [dollar amount(s)]"

(o) Type(s) of case(s) that the member or the member's firm is willing to accept on a contingency fee basis, *together with* the terms of a typical contingency fee contract (including, without limitation, how both investigation costs and litigation costs are computed and paid) *and* all of the variables and other relevant factors that could affect the stated terms;

*Form:* "contingency fee case(s): [type(s) of case(s)], [terms of contingency fee contract(s), together with all variables and relevant factors]"

(p) Name(s) of credit card(s) accepted by the member or the member's firm in payment of fees (or a statement that credit cards are not accepted);

*Form:* "[name(s) of credit card(s)] accepted"

(q) A statement that the member or the member's firm regularly accepts (or does not regularly accept) installment payments of fees on mutually satisfactory terms;

*Form:* "installment payments accepted on mutually satisfactory terms"

(r) A statement that the member or the member's firm is (or is not) willing to submit any fee dispute(s) to arbitration, and if so willing a statement that such arbitration is or is not binding;

*Form:* "fee disputes submitted to [binding] arbitration"

(s) A statement that the member holds current certificate(s) as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Board of Governors;

*Form:* "certified specialist in [field(s) of law]"

(t) A statement that the member is registered to practice in patent matters before the United States Patent and Trademark Office;

*Form:* "patents" or "patent law" or "registered to practice in patent matters"

(u) Field(s) of law to which the member and/or member's firm limits the member's and/or firm practice;

*Form:* "[lawyer's] [firm's] practice limited to: [field(s) of law]"

(v) One or more fields of law in which the member or the member's firm concentrates or primarily engages (not to exceed (i) in the case of a member, three, and (ii) in the case of a firm, three per member or ten, whichever is less);

*Form:* "[lawyer' or 'firm'] ['concentrates in:' or 'primarily engages in:'] [field(s) of law]"

(w) One or more fields of law in which the member or the member's firm accepts cases, *together with* the information set forth in (v) above;

*Form:* "[lawyer' or 'firm'] ['concentrates in:' or 'primarily engages in:'] [field(s) of law] and accepts cases in: [field(s) of law]"

(x) A statement that the member or the member's firm is interested in providing professional services under group legal services

plan(s) which the member or the member's firm does not actually serve;

*Form:* "interested in serving group plans"

(y) A statement that the member or the member's firm is interested in providing professional services under prepaid legal services plan(s) which the member or the member's firm does not actually serve;

*Form:* "interested in serving prepaid plans"

(z) One or more fields of law in which the member and/or the member's firm will not accept cases;

*Form:* "[lawyer] [firm] will not accept cases in: [field(s) of law]"

(aa) Number of active members of the State Bar (including the member), who are associated with the member or the member's firm in the practice of law on a substantially full-time basis;

*Form:* "number of California lawyers: [whole number]"

(bb) Name(s) of (i) active member(s) of the State Bar who are, (ii) deceased member(s) of the State Bar who have been and (iii) with their consent, living member(s) of the State Bar who have been, associated with the member or the member's firm in the practice of law, and a statement with regard to each, that he or she is or was (i) a full-time partner, (ii) a full-time associate or (iii) has a continuing relationship with the member or the member's

firm other than as a full-time partner or a full-time associate ("of counsel"), *together with* the pertinent dates with regard to any such member who is not currently associated with the member or the member's firm in the practice of law;

*Form:* "[partner(s):] [name(s) and, if applicable, dates of former association in years];

[associate(s):] [name(s) and, if applicable, dates of former association in years];

[of counsel:] [name(s) and, if applicable, dates of former association in years]"

(cc) Date and place of the member's birth;

*Form:* "born: [date, place]"

(dd) State(s) and federal court(s) in which the member is entitled to practice law, *together with* the date(s) of admission to such practice;

*Form:* "admitted to practice in: [state, year]; [state, year]; [name of federal court, year]; [name of federal court, year]; [etc.]"

(ee) Name(s) of other professional license(s) currently or formerly held by the member, *together with* the state(s) issuing the license(s) and the pertinent dates;

*Form:* "other license(s): [official title or abbreviation of license(s) *currently* held], [state(s) of issuance], [first year of member's continuous holding of the license(s)]



'—present'; [official title or abbreviation of license(s) *formerly* held], [state(s) of issuance], [dates in years that license(s) were held]"

(ff) Name(s) of school(s) from which the member has graduated, and with regard to each such school, a statement describing the nature of the school, the date the member graduated, the degree(s) the member received and any scholastic distinction(s) the member received;

*Form:* "[ 'college' or 'law school' or 'engineering school' or other appropriate description of the nature of the school attended by the member]: [name of school; year of graduation, degree(s) received, official name or abbreviation of scholastic distinction(s) received]"

(gg) Official title(s) of public or quasi-public office(s) or post(s) of honor currently or formerly held by the member, *together with* the pertinent dates;

*Form:* "[official title or abbreviation of office(s) or post(s) of honor *currently* held], [year member's current term began] '—present'; [official title or abbreviation of office(s) or post(s) of honor *formerly* held], [dates in years that office or post was held]"

(hh) Name(s) of the branch(es) of the armed forces of the United States in which the member served, and the pertinent dates of such service;

*Form:* "[name(s) of branch(es)], [dates of service in years]"

(ii) Publication(s) authored by the member;

*Form:* "author: [title of work authored, title of publication, date of publication]"

(jj) Teaching position(s) currently or formerly held by the member, *together with* the pertinent dates;

*Form:* "[official title or abbreviation of position *currently* held], [name of school], [first year of member's continuous service in position] '—present'; [official title or abbreviation of position *formerly* held], [name of school], [dates in years that position was held]"

(kk) Name(s) of organization(s) or component(s) thereof to which the member belongs or belonged, and the pertinent dates of such membership;

*Form:* "member: [official name(s) or abbreviation(s) of organization(s) to which the member *currently* belongs], [first year of member's continuous membership therein] '—present'; [official name(s) or abbreviation(s) of component(s) of organization(s) to which the member *currently* belongs], [first year of member's continuous membership therein] '—present'; [official name(s) or abbreviation(s) of organization(s) to which the member *formerly* belonged], [dates of membership in years];

[official name(s) or abbreviation(s) of component(s) of organization(s) to which the member *formerly* belonged], [dates of membership in years]"

(II) Name(s) of position(s) of responsibility currently or formerly held by the member in organization(s), *together with* the pertinent dates;

*Form:* "[official name(s) or abbreviation(s) of position(s) *currently* held] [first year of member's continuous service in position(s)] '—present'; [official name(s) or abbreviation(s) of position(s) *formerly* held], [dates in years that position was held]"

(C) In addition to the conduct permitted by this rule, members of the State Bar and law firms may continue to be listed in a telephone directory, community directory or guide, law list or legal directory, or in a membership roster, membership register, membership directory or other membership list of a service club, charitable organization, fraternity, school alumni association or business, professional or trade association to which the member belongs, in the manner previously permitted by Rules 2-103(A) (5), (6) and (7) and 2-106(4) of the Rules of Professional Conduct extant immediately prior to effective date of this rule.

Rule 2-103. Professional Announcements, Door and Office Signs, Professional Cards, Letterheads and Trade Names.

Only to the extent permitted in this rule:

(A) A member of the State Bar available to act as a consultant to or as an associate of other members of the State Bar may distribute to other members of the State Bar and publish in legal journals circulated or distributed primarily to members of the State Bar or lawyers licensed in other jurisdictions an announcement in modest and dignified form of such availability setting forth any of the information permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein.

(B) A member of the State Bar or a member's law firm may mail to lawyers, clients, former clients, personal friends and relatives a brief professional announcement card in modest and dignified form stating new or changed associations or addresses, change of firm name, or similar matters, pertaining to the professional office of the member or of the member's firm and any of the information permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein. The announcement may be distributed only once for any new or changed association or address, change of firm name, or similar matters.

(C) A member of the State Bar or a member's law firm may have a sign in modest and dignified form on or near the door of the member's or firm's law office and in the building directory identifying the law office. The sign may state the nature of the practice only to the extent permitted under Rule 2-102(B)(3)(s), (t), (u) or (v) in substantially the form and language set forth therein.

(D) A member of the State Bar or a member's law firm may use a professional card in modest and dignified form and only for the purpose of identification. The professional card of a member may identify the member by name as a lawyer and give the member's address(es), telephone number(s) and give the name of the member's law firm in substantially the form and language set forth in Rule 2-102(B)(3)(b). The professional card of a law firm may give its name in substantially the form and language set forth in Rule 2-102(B)(3)(b) and may also give the names of members and associates. The card may state the nature of the practice only to the extent permitted under Rule 2-102(B)(3)(s), (t), (u) or (v) in substantially the form and language set forth therein.

(E) A member of the State Bar or a member's law firm may use stationery with a professional letterhead in modest and dignified form. The letterhead of a member may identify the member by name and as a lawyer and give the member's address(es), telephone number(s), the name of the member's law firm in substantially the form and language set forth in Rule 2-102(B)(3)(b) and the names of members and associates thereof. A letterhead of a law firm may give its name in substantially the form and language set forth in Rule 2-102(B)(3)(b) and may also give the names of members and associates, names and dates relating to deceased and retired members, and the names and dates of predecessor firms in a continuing line of succession. A member

of the State Bar may be designated "of counsel" on a letterhead if the member has a continuing relationship with a lawyer or law firm other than as a full-time partner or associate. The letterhead may state the nature of the practice only to the extent permitted under Rule 2-102(B)(3)(s), (t), (u) or (v) in substantially the form and language set forth therein.

(F) A member of the State Bar who is engaged both in the practice of law and another profession or business shall not so indicate on his or her office sign, professional card or letter head, nor shall the member identify himself or herself as a member of the State Bar in connection with the member's other profession or business.

(G) A member of the State Bar or a member's law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the member or the firm devotes a substantial amount of professional time in the representation of that client, provided the member of the State Bar uses such letterhead only for correspondence relating to the professional representation of the client the member represents as general counsel unless the member performs no legal services for anyone other than the client the member represents as general counsel.

(H) A member of the State Bar or a member's law firm may practice under a fictitious name, provided that such name (1) includes the member's name or the name(s) of other member(s) of the



State Bar who are associated with the member or the member's firm in the practice of law or the name(s) of deceased or retired member(s) of the firm or of a predecessor firm in a continuing line of succession or the name of a partnership within the meaning of (1) of this rule or, in the case of a law corporation, complies with the provisions of section 6164 of the Business and Professions Code, (2) is not false, fraudulent, misleading, deceptive or unfair, (3) is not likely to mislead or deceive, (4) does not contain laudatory statements about the member or the member's firm, (5) is not intended or likely to create false or unjustified expectations of favorable results, (6) does not convey the impression that the member or the member's firm is in a position to influence improperly any court, tribunal or other public body or official, (7) is not intended or likely to result in a legal action or position being taken or asserted primarily to harass or maliciously injure another, (8) is not intended or likely to appeal primarily to a person's fears, greed, desires for revenge or similar emotions, and (9) does not contain representations or implications that are likely to deceive or to cause misunderstanding.

(I) A partnership may be formed or continued between or among lawyers licensed in different jurisdictions, provided all enumerations of the members and associates of the firm make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions, and further provided that (1) each per-

son occupying each office of the firm located in California who shall hold himself or herself out as a member or associate of such firm shall be an active member of the State Bar and (2) each person holding himself or herself out as a member of the firm shall be a bona fide partner in such firm, with a bona fide share in the profits, liabilities and professional responsibilities thereof and (3) at least one person occupying each office of the firm located in California shall be such a bona fide partner and an active member of the State Bar.

#### Rule 2-104. Public, Group and Prepaid Legal Service Programs.

(A) The participation of a member of the State Bar in a legal aid plan or program for the furnishing of services to indigents or pursuant to the plan or program or a non-profit organization formed for charitable or other public purposes which furnishes legal services to persons only in respect to their civic or political or constitutional rights and not otherwise in furtherance of such charitable or other public purposes of such organization, and the publicizing of such plans or programs are not, of themselves, violations of these Rules of Professional Conduct provided the name of such member of the State Bar is not publicized. Nothing in this rule shall prohibit a representative of such a plan or programs from stating in response to inquiries as to the identity of such member of the State Bar any of the information con-

cerning the member permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein.

(B) The participation of a member of the State Bar in a lawyer referral service established, sponsored, supervised and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California, as adopted and as from time to time amended by the Board of Governors is not, of itself, a violation of these Rules of Professional Conduct provided the name of such member of the State Bar is not publicized. Nothing in this rule shall prohibit a representative of such lawyer referral service from identifying a member of the State Bar who is participating in that service, and stating any of the information concerning the member permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein, in connection with the making of a requested referral in conformity with the said Minimum Standards. A member of the State Bar may permit his or her name to be listed in lawyer referral service offices according to the fields of law in which the member will accept referrals and in such manner as is proper under the standards which the Board of Governors may from time to time promulgate.

(C) The furnishing of legal services by a member of the State Bar pursuant to an arrangement for the provision of such services to the individual member of a group, as herein defined, at the request of such

group, is not of itself in violation of these Rules of Professional Conduct if the arrangement:

(1) permits any member of the group to obtain legal services independently of the arrangement from any attorney of his or her choice,

(2) is so administered and operated as to prevent

(a) such group, its agents or any member thereof from interfering with or controlling the performance of the duties of such member of the State Bar to the member's client.

(b) such group, its agents or any member thereof from directly or indirectly deriving a profit from or receiving any part of the consideration paid to the member of the State Bar for the rendering of legal services thereunder,

(c) unlicensed persons from practicing law thereunder, and

(d) all publicizing and soliciting activities concerning the arrangement except by means of simple, dignified announcements setting forth the purposes and activities of the group or the nature and extent of the legal services or both, without any identification of the member or members of the State Bar rendering or to render such services.

Nothing in this rule shall prohibit a statement in communications to persons entitled to receive legal services under the arrangement or in response to individual inquiries as to the identity of the member



or members of the State Bar rendering or to render the services giving any of the information concerning the member or members permitted in Rule 2-102 (B) (3) in substantially the form and language set forth therein.

As used in this rule, a group means a professional association, trade association, labor union or other non-profit organization or combination of persons, incorporated or otherwise and including employees of a single employer, whose primary purpose and activities are other than the rendering of legal services.

A member of the State Bar furnishing legal services pursuant to an arrangement for the provision thereof shall advise the State Bar thereof within 60 days after the entering into the same. Thereafter the member shall advise the State Bar, on forms provided by it, of the following matters: the name of the group, its address, whether it is incorporated, its primary purposes and activities, the number of its members and a general description of the types of legal services offered pursuant to the arrangement. Annually on January 31, the member shall report to the State Bar, on forms provided by it, any changes in such matters, and the number of members of the group to whom legal services were rendered during the calendar year. Each report filed pursuant hereto and the information contained therein, except the name and address of the group, the fact that it has an arrangement for the provision of legal services and the names of members of the State Bar providing such services shall be confidential.

(D) Section a. The furnishing of legal services by a member of the State Bar pursuant to an arrangement for pre-paid legal services or other plan for defraying the costs of professional services of attorneys, is not of itself in violation of these Rules of Professional Conduct, if:

(1) the arrangement was established by or at the request of a group defined in Rule 2-104 (C) of these rules for the individual members of the group and other wise complies with Rule 2-104 (C); or

(2) the arrangement is developed, administered and operated by a non-profit organization, incorporated or otherwise and

(a) permits any client to obtain legal services independently of the arrangement, from any attorney of his or her choice; and

(b) is so developed, administered and operated that

(i) the panel of attorneys furnishing legal services thereunder consists of at least 20% or 1000 of the active members of the State Bar engaged in private practice and maintaining their principal offices in the geographical area served by the arrangement, whichever is the lesser number, but in no event less than 15 such active members; and

(ii) the panel of attorneys furnishing the legal services thereunder is open to any active member of the State Bar engaged in practice in the geographical



area served by the arrangement, provided that a panel of attorneys which is open to all of the members of a local bar association is deemed to comply with this requirement if membership in that bar association is open to any active member of the State Bar engaged in practice in said geographical area, and

(iii) the client shall have the right to select any attorney on the panel to perform the legal services provided that the attorney consents to perform the legal services, and

(iv) any referral of a client to an attorney or attorneys on the panel of attorneys furnishing legal services under the arrangement shall be at the request of the client and in a manner consistent with those provisions of the "Minimum Standards for a Lawyer Referral Service in California" respecting the making of referrals; and

(c) is so developed, administered and operated as to prevent

(i) a third party from interfering with or controlling the performance of duties of the member of the State Bar to the member's client, and

(ii) a third party from receiving any part of the consideration paid to the member of the State Bar for furnishing legal services thereunder except

as permitted by Rules 2-108 and 3-102 of these rules, and

(iii) unlicensed persons from practicing law thereunder, and

(iv) all publicizing and soliciting activities concerning the arrangement except by means of simple, dignified announcements setting forth the purposes and activities of the non-profit organization or the nature and extent of the benefits pursuant to the arrangement or both, without any identification of the member or members of the State Bar rendering or to render legal services; provided that all such publicizing and soliciting activities are in good faith engaged in solely for the purpose of developing, administering or operating the arrangement, and not for the purpose of soliciting business for, or for the self-aggrandizement of, any specific member or members of the State Bar; provided further that all publicizing and soliciting activities concerning the arrangement, except publicizing activities directed at persons entitled to receive legal services under the arrangement, shall terminate at such time as the total number of persons entitled to receive legal services under all arrangements of which the State Bar is advised pursuant to Rule 2-104 (C) of these rules is equivalent to the total number of persons entitled to receive legal services under all arrange-

ments reported to the State Bar pursuant to Section b.1.(b) of this Rule 2-104(D). For the purposes of this subsection (c)(iv) "persons" shall not include those who are eligible to receive legal services solely by reason of being a spouse or dependent family member.

Once the requirements of Section a.2.(b)(i) of this Rule 2-104(D) have been satisfied, nothing in this rule shall prohibit a statement in communications to persons entitled to receive legal services under the arrangement or in response to individual inquiries as to the identity of the member or members of the State Bar rendering or to render the services giving any of the information concerning the member or members permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein.

As used in this section, "geographical area" means any one of the following: (1) the state; (2) one or more municipal court judicial districts; (3) any combination of one or more municipal court judicial districts together with one or more counties; (4) one or more counties; (5) one or more of the superior court districts in a county of 5,000,000 or more persons according to the latest federal census.

Section b. Subject to the provisions of Section c. of this Rule 2-104(D), a member of the State Bar who has agreed to furnish legal services pursuant to an arrangement for prepaid legal services or other plan for defraying the costs of professional services of attorneys, shall

(1) Within 60 days after entering into such agreement, file a notice thereof with the State Bar, and thereafter file with the State Bar, on the report forms provided by it and within 60 days after receiving such forms, the following under either (a) or (b), as applicable:

(a) If the arrangement was established by or at the request of a group pursuant to Section a.1. of this Rule 2-104(D):

(i) the name and office address of the group, the number of its members, its primary purposes and activities, and a copy of any agreement the member of the State Bar has entered into with the group respecting the arrangement;

(ii) if a person or entity other than the group itself is administering the arrangement, the name and office address of such person or entity, whether such person or entity is incorporated, a copy of any agreement the member of the State Bar has entered into with such person or entity respecting the arrangement, and a copy of any agreement such person or entity has entered into with the group respecting the arrangement; and

(iii) a description of the methods and procedures under the agreement, if any, (A) whereby a client who is entitled to benefits under the arrangement may, upon request, be referred to an attorney or attorneys on the panel of attorneys furnishing legal services

under the arrangement, (B) for periodically obtaining from those being served by the arrangement their comments, evaluations and recommendations respecting the operation of and furnishing of legal services under the arrangement, and (C) for resolution of client grievances.

(b) If the arrangement is developed, administered and operated by a non-profit organization pursuant to Section a.2. of this Rule 2-104(D) :

(i) the name and office address of the non-profit organization and, if incorporated, a copy of its articles of incorporation and by-laws;

(ii) the geographical area served by the arrangement;

(iii) a copy of any agreement between the member of the State Bar and the non-profit organization respecting the arrangement;

(iv) the name and office address of any group being served by the arrangement, the number of its members, its primary purposes and activities, and a copy of any agreement the member of the State Bar or the non-profit organization, or both, has entered into with the group respecting the arrangement;

(v) if individuals, as distinguished from members of a group, are being served by the arrangement, then the number of such individuals and a copy

of each form of agreement entered into between the non-profit organization and such individuals respecting the arrangement; and

(vi) a description of the methods and procedures under the arrangement, if any, as required under 1.(a)(iii) of this section.

(2) Annually thereafter, by January 31, file with the State Bar, on the report forms provided by it, the following: the number of persons to whom the member rendered legal services during the preceding calendar year pursuant to the arrangement, and the types of such services; and the changes, if any, in the information or documents the member filed with the State Bar under either 1.(a) or 1.(b) of this Section b.

Section c. Any notice, information or documents required to be filed by a member of the State Bar pursuant to Section b. of this Rule 2-104(D) need not be filed by such member personally if, within the time periods specified in that section, such notice, information or documents are filed on the member's behalf by either: (1) the group's officer, agent, or employee having primary responsibility for the arrangement established pursuant to Section a.1. of this Rule 2-104(D), or if such arrangement is being administered by a person or entity other than the group, by such person or entity; (2) the non-profit organization administering the arrangement pursuant to Section a.2. of this Rule 2-104(D).



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When such notice, information or documents are so filed on behalf of two or more members of the State Bar for any one arrangement, they shall be consolidated where possible in a single notice or reporting form and documents already on file may be incorporated by reference so long as there are no changes therein.

Section d. Any notice, information or documents received by the State Bar pursuant to Sections b. or c. of this Rule 2-104(D) shall be public, whether or not also received by the State Bar pursuant to Rule 2-104(C) of these rules.

FOR ARGUMENT

Supreme Court, U. S.  
FILED

DEC 15 1976

MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

NO. 76-316

JOHN R. BATES and VAN O'STEEN,

*Appellants,*

v.

STATE BAR OF ARIZONA,

*Appellee.*

On Appeal from the Supreme Court  
of the State of Arizona

BRIEF ON THE MERITS OF *AMICUS CURIAE*,  
ARIZONA CREDIT UNION LEAGUE, INC.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1976

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NO. 76-316

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JOHN R. BATES and VAN O'STEEN, *Appellants*,

v.

STATE BAR OF ARIZONA, *Appellee*.

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On Appeal from the Supreme Court  
of the State of Arizona

---

BRIEF ON THE MERITS OF *AMICUS CURIAE*,  
ARIZONA CREDIT UNION LEAGUE, INC.

---

INTEREST OF AMICUS

Amicus, Arizona Credit Union League, Inc., (hereinafter "League") is a voluntary, nonprofit association of 160 Arizona credit unions with an approximate membership of 425,000 Arizona citizens.

The League sponsors on a statewide basis a group legal service program known as Family Legal Services. To date, 77 credit unions have contracted with a Phoenix law firm to pro-

vide group legal services to the credit unions' membership and over 3,300 credit union members have chosen to participate in the Family Legal Service program.

For an annual fee of \$25.00, the Family Legal Service program entitles the credit union member and his family to an unlimited number of telephone consultations throughout the membership year. The telephone consultation includes telephone contact and letter writing by the attorney in order to resolve the member's problem. If the legal problem cannot be resolved by virtue of the telephone consultation, the credit union member is referred to an attorney in the member's geographical area. Referrals generally involve legal matters which are listed on a guaranteed, fixed fee schedule covering such areas as domestic relations, wills, real estate, probate, traffic and consumer matters.

The League believes that its group legal service program provides credit union members with immediate access to qualified attorneys at a fee which its membership can afford.

Amicus is vitally interested in the outcome of this case. It is essential for the success of the Family Legal Service program that credit unions be able to communicate with their members concerning the benefits of this program.

Amicus takes the position that the decision in this case should not affect the clear and unfettered constitutional right which groups have to communicate freely with their membership.

Amicus has received the written consent of all parties in this case to file a brief on the merits and request is made that this Court enter an appropriate order in this regard.

#### SUMMARY OF ARGUMENT

The League sponsors a group legal service program known as Family Legal Services with over 3,300 families presently participating. Essential to the success and development of this program is the unrestricted ability of the League and its associated credit unions to promote to its membership the availability of the program, including its emphasis on preventive law, the cost of legal services and the competency of counsel.

It is the position of Amicus that a distinction exists between lawyer advertising and group communication, namely, the former being commercial speech and the latter being non-commercial. While lawyer advertising involves no more than proposing a commercial transaction in regard to the selling of legal services, it is clear that the decision in *NAACP v. Button*,

371 U.S. 415 (1963), *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964), *United Mine Workers v. Illinois State Bar Assn.*, 389 U.S. 217 (1967) and *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971), indicate a First Amendment protection for collective activity and communication undertaken for the purpose of obtaining meaningful access to the courts and enabling families to obtain affordable and competent legal representation.

The difference between commercial and noncommercial speech also is important to the related issue of regulation. Amicus contends that lawyer advertising could be subject constitutionally to more regulation than group communication.

Finally, if the court continues the prohibition against lawyer advertising, Amicus is concerned with the possible spillover effect regarding the ability of groups to communicate effectively with their membership. The history of group legal services illustrates the obstacles which the organized bar has placed in the path of its development. Even if the Court takes the position that lawyer advertising is impermissible, Amicus would hope that recognition be continued regarding the First Amendment protection afforded to group legal service communication.



## ARGUMENT

### LAWYER ADVERTISING DIFFERS FROM GROUP COMMUNICATION REGARDING FIRST AMENDMENT PROTECTION

1. The Appellants and particularly Amici Curiae, Consumers Union of United States, Inc., Public Citizen, Inc. and the National Consumer Center For Legal Services, argue that commercial lawyer advertising is similar to group legal service communication and, therefore, enjoys constitutional protection under the authority of *Button, Trainmen, United Mine Workers* and *United Transportation Union, supra*.

While Amicus does not disagree with Appellants' claim to a constitutional right to advertise, Amicus strongly objects to the contention of Appellants and Amici Curiae that lawyer advertising and group communication are constitutionally similar. This Court has stated:

"Regardless of the particular label asserted by the State — whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation' — a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation. The diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees." *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).

The Appellants clearly were selling to the public a legal ser-

vices at y prices and were doing no more than proposing a commercial transaction. See *Pittsburgh Press Co. v. Pittsburgh Comm's on Human Relations*, 413 U.S. 376, 385 (1973).

Last term this Court recognized that advertising the price of prescription drugs was "commercial speech" and protected by the First Amendment. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 96 S.Ct. 1817 (1976). However, the majority opinion in *Virginia State Board of Pharmacy, supra*, also indicated that other varieties of speech were noncommercial in nature even though:

"money is spent to project it, as in a paid advertisement of one form or another . . . . *New York Times Co. v. Sullivan*, 376 U.S., at 266 . . . even though it is carried in a form that is "sold" for profit . . . and even though it may involve a solicitation to purchase or otherwise pay or contribute money . . . . *New York Times Co. v. Sullivan, supra*; *NAACP v. Button*, 371 U.S. 415, 429. . ." (other citations omitted). *Virginia State Board of Pharmacy, supra*, 96 S.Ct. at 1825.

Amicus contends that a group's communication to its members concerning legal services is clearly noncommercial speech. This Court repeatedly has recognized the right of individuals to assemble and to petition for a redress of grievances and has stated specifically concerning group legal services:

"The common thread running through our decisions in *NAACP v. Button*, *Trainmen*, and

*United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation." *United Transportation Union, supra*, 401 U.S. at 585-586.

The communication between the credit union and its members concerning Family Legal Services is fundamental to the program's objectives of apprising members of their legal rights<sup>1</sup> and in assisting families in obtaining affordable and competent legal representation.<sup>2</sup>

<sup>1</sup> A related objective is educating credit union members to behave more knowledgeably in legal affairs. The most obvious area in which credit union members should become knowledgeable concerns real estate transactions. Unfortunately, Arizona citizens have been the victim of widespread land fraud and credit union members have lost much of their limited savings through land fraud schemes. It is of some interest to note that the Attorney General of the State of Arizona issued an opinion on June 10, 1976, which indicated that student legal services were related to the educational needs of students for the reason that in part the program would help the students "achieve good citizenship by enabling them to behave more knowledgeably in legal affairs." Att. General Op. # R76-122.

<sup>2</sup> Arizona Revised Statutes § 6-501 (2) defines credit union as: "A 'credit union' is a cooperative nonprofit society, association or group organized and incorporated in accordance with the provisions of this chapter, for the purposes of creating thrift and self-reliance among its members and to make credit available to people of small means, through a system of cooperative lending at a reasonable and legitimate rate of interest in order to improve their economic and social condition."

United States Code Annotated § 12-1752 (1) states: "Federal Credit Union means a cooperative association organized in accordance with the provisions of this Chapter for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes."

As professor Archibald Cox has stated:

"... [T]he unfilled need for legal services would seem to center about two difficulties which it may be impossible to overcome without changes in the organization, or structure, of the legal profession and, incidentally, in some of the canons of ethics. The first difficulty is the inability of individuals to meet the high cost of the legal services that they occasionally require . . . . Second, and possibly more important, is the problem of ignorance. The ignorance is of two kinds; first, ignorance of the possibility that legal advice might be helpful and legal remedies may be available; second, distrust of strange lawyers and ignorance as to whether and where reliable legal services can be obtained either without cost or with the limited ability to pay. . . ." A. Cox, *Poverty and the Legal Profession*, 54 Ill. B.J. 12, 14-15 (1965).

In recognition of the fact that meaningful access to the courts is a fundamental right,<sup>3</sup> this Court has ruled that groups have a constitutional right to contact their members about their legal rights and advise them concerning a reliable lawyer. As the Court stated in *Brotherhood of Railroad Trainmen, supra*, 377 U.S. 5-6:

"It cannot be seriously doubted that the First Amendment's guarantees of free speech, peti-

<sup>3</sup> Barlow Christensen in *Lawyers For People Of Moderate Means* (Chicago, American Bar Association, 1970), at page 5, footnote 4, estimates that there are 140,000,000 Americans of moderate means (those with incomes between \$5,000 and \$15,000) and that the members of this group are unable to afford standard legal fees for some or all of their legal problems.

tion and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be in vain and futile if the workers could not talk together freely as to the best course to follow. The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance — and, most importantly, what lawyer a member could confidently rely on — is an inseparable part of this constitutionally guaranteed right to assist and advise each other.”<sup>4</sup>

The distinction between the classification of lawyer advertising and group communication in regard to First Amendment coverage is also crucial for the related issue of regulating such speech.<sup>5</sup> In *Virginia State Board of Pharmacy, supra*, 96 S.Ct. at

<sup>4</sup>The ABA Code of Professional Responsibility attributes nonutilization of the legal system to the general public's inability to afford the cost of legal services, its ignorance of the need and value of legal services and the inability of laymen to select dependable counsel. ABA Code of Professional Responsibility (1970), EC 2-1, 2-2 and 2-7, footnotes 3, 17.

<sup>5</sup>Amicus presently is confronted with a proposed Arizona Ethics opinion which has the effect of prohibiting Arizona attorneys from cooperating with groups which indicate to their membership that the fees are “reduced” and the attorneys are “qualified”. Besides the members' basic need to know this information, the primary purpose of a credit union is to develop thrift among its members.

1830-1831, fn. 24, the Court recognized that regulation of commercial speech<sup>6</sup> is more appropriate than regulation of other varieties of speech.<sup>7</sup>

In contrast, this Court repeatedly has held that “government has no power to restrict expression because of its message, its ideas, its subject matter or its content.” *Virginia State Board of Pharmacy, supra*, 96 S.Ct. at 1817 (Stewart J., concurring). See also *Police Department of Chicago v. Mosely*, 408 U.S. 92, 95 (1972); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975); *Pell v. Procunier*, 417 U.S. 817, 828 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972).<sup>8</sup>

<sup>6</sup>Due to the unique position of lawyers in our society, the regulation of lawyer advertising may be more extensive than other forms of commercial advertising. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975); *Cohen v. Hurley*, 366 U.S. 117, 123-124 (1961); *Note: Commercial Speech — an End in Sight to Chrestensen?*, 23 De Paul L. Rev. 1258, 1273 (1974).

<sup>7</sup>The majority opinion in *Virginia State Board of Pharmacy, supra*, 96 S.Ct. 1830-1831, fn.24, believed commercial speech was more easily “verifiable” and more “durable”. For those reasons, there was less chance that regulation would chill commercial expression. In the group legal service situation, while the group's access to information is substantial, it certainly is different from the commercial advertiser. Additionally, most groups which offer legal service programs are not in the legal service profession and, therefore, group legal service communication is not the *sine qua non* of the group's profit.

<sup>8</sup>Of course, this does not mean that “untruthful” speech has any constitutional protection. See *Virginia State Board of Pharmacy, supra*, 96 S.Ct. at 1830.



Amicus urges that this Court continue to recognize that group legal service communication enjoys a First Amendment protection quite different from the commercial speech of lawyer advertising.

2. Appellee's position always has been that lawyer advertising is a form of speech which enjoys no First Amendment protection. This Court may conclude that a lawyer, being "an officer of the court", is precluded from advertising. See *Cohen, supra*, 366 U.S. at 124, and *Semler v. Dental Examiners*, 294 U.S. 608, 612 (1935). This Court may legitimately find that public information as to the availability and cost of legal services is being significantly increased by group legal service arrangements. The Special Committee, chartered by the American Bar Association to study group legal service plans, found that the available evidence:

"amply show(s) that there has been and continues to be an unmet need for legal services . . . (Moreover,) all of the studies which have been conducted identify unfamiliarity with legal rights, lack of personal contact with a lawyer and the cost (or fear of the cost) of his services as the basic reasons why people fail to seek lawyer's services. To a greater degree than any other device, group arrangements provide a solution to all these problems." Report of the ABA's Special Committee on Availability of

Legal Services, 19 (August 1969).<sup>9</sup>

However, Amicus is concerned that if this Court prohibits lawyer advertising, such a decision could have a negative impact on the ability of groups to communicate effectively with their membership. The four Supreme Court decisions of *Button*, *Trainmen*, *United Mine Workers* and *United Transportation Union, supra*, illustrate the severe obstacles which the organized

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<sup>9</sup>It is of interest to note that the Arizona Supreme Court in December, 1976, recognized the need to equalize the opportunity among lawyers to participate in group legal services. The Arizona Supreme Court promulgated the following amendment and addition to the Arizona Code of Professional Responsibility:

DR 2-101(B):

"(6) In communications by a qualified legal assistance organization, along with the biographical information permitted under DR 2-102(A) (6), directed to a member or beneficiary of such organization, or to any individual or group for the purpose of offering to such individual or group the legal services recommended, furnished, or paid for by such organization.

"(7) In communications by any person other than a qualified legal assistance organization which are specifically directed to the officers or other representatives of any bona fide group of 15 or more individuals, along with the biographical information permitted under DR 2-102(A) (6) for the purpose of offering to provide legal services to the members or beneficiaries of such group on the basis of an agreement to be negotiated with such group.

"Provided further, that in communications authorized under subsections (6) and (7) hereof, the terms and conditions upon which such legal services are offered or proposed to be offered may also be included therein."

bar has placed in the path of the development of group legal services.<sup>10</sup>

As indicated earlier, the League and its associated credit unions have contracted with a group of attorneys to provide legal services for specific fees. This group fee arrangement was expressly recognized in *United Transportation Union, supra*, 401 U.S. at 584-586.<sup>11</sup> The credit unions communicate to their membership that these fees are reduced and that the lawyers are qualified.<sup>12</sup> Certainly, a confirmation of the traditional ban against lawyer advertising should not give justification or incentive for the organized bars to believe that such a prohibition is

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<sup>10</sup> Amicus recently opposed an effort by members of the Bar to restrict group legal services to "prepaid" plans, which would have had the effect of prohibiting Amicus' group legal service program. A North Carolina statute prohibits prepaid legal service plans which restrict a person from selecting his own attorney, thereby nullifying the operation of closed panel plans. G.S.N.C. 584-23.1(b) and (e). And Maryland Ethical Opinion No. 77-5 prohibits attorneys from participating in group legal service plans.

<sup>11</sup> Even if this Court should determine that price advertising by lawyers is inherently misleading, this Court has held that groups enjoy a constitutional protection in contracting for legal services at a specified price. See *United Transportation Union, supra*, 401 U.S. at 584-586.

<sup>12</sup> As noted earlier, an Arizona proposed ethical opinion would preclude lawyers from cooperating with groups which use the words "reduced" or "qualified" in communicating to their membership. In *Brotherhood of Railroad Trainmen, supra*, 377 U.S. at 5, this Court approved a group of legal service plan which channeled "legal employment to particular lawyers approved by the Brotherhood as legally and morally competent to handle injury claims for members and their families." (Emphasis added)

applicable to the constitutionally protected group legal service plans.<sup>13</sup>

### CONCLUSION

The issue of lawyer advertising raises new and difficult problems for the Court in regard to the classification of speech and its proper regulation. Amicus would hope that this Court in its deliberation of lawyer advertising would clearly distinguish it from group legal service communications. The result would be, once again, to make clear to all concerned that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transportation Union, supra*, 401 U.S. at 585.

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<sup>13</sup> Of course, lawyers cooperating with group legal service plans have the same constitutional protection as the group. In *Brotherhood of Railroad Trainmen, supra*, 377 U.S. at 8, this Court stated: "lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge."

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FOR ARGUMENT

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1976

No. 76-316

JOHN R. BATES and VAN O'STEEN,  
*Appellants,*

v.

STATE BAR OF ARIZONA,  
*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

**BRIEF FOR THE AMERICAN BAR ASSOCIATION  
AS AMICUS CURIAE**

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## IN THE Supreme Court of the United States

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JOHN R. BATES and VAN O'STEEN,  
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v.

STATE BAR OF ARIZONA,  
*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

---

### BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE\*

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#### INTEREST OF AMICUS CURIAE

The American Bar Association is a voluntary bar association whose membership is open to the members of the bar of the States, territories and possessions of the United States. It is the largest organization of the legal profession in the United States, having more than 200,000 members. One of the most important purposes of the ABA is the development and recommendation of professional standards, including ethical rules on the dissemination of in-

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\* This brief is filed with the consent of all parties pursuant to Rule 42 of the Court.

formation to the public. The permissible scope of such rules which the States are free to adopt and the First Amendment rights of the ABA to recommend such rules to the States may be significantly affected by this case.

### SUMMARY OF ARGUMENT

The extent to which and the manner in which lawyers should be permitted to advertise constitute only one aspect of the broader and more complex problem of how information about the availability of legal services should best be disseminated to the public. In determining which practices should be allowed, the States are obviously concerned with preventing false or misleading communications as well as communications which confuse or fail to inform. Because of the wide variation in needs of individual clients, differences in ability and experience among attorneys, and the disparity of knowledge between lawyers and laymen with respect to legal matters, communications concerning professional services present special problems which do not arise in connection with the advertising of standardized products.

The prevention of misleading, confusing or non-informative announcements is not, however, the only concern of the States. Certain forms of information dissemination concerning legal services may affect the quality and nature of those services, may compromise the independence of an attorney, may draw into question the integrity of the judicial process, may encourage the bringing of litigation for improper motives, and may have other adverse consequences for the judicial system.

Appellants acknowledge the need for regulation of advertising by attorneys but focus upon what they characterize as the "overbreadth" of the Arizona regulations.

However, the Court has never applied the overbreadth doctrine to economic regulation or to commercial speech, and to do so would seriously impair the power of Congress and the States with respect to economic matters.

The question presented in this case is whether the States are required by the First Amendment to follow a single uniform approach having as an indispensable element the toleration of newspaper advertising like that published by appellants. Neither the case law nor public policy supports such a rigid result, given the uncertainty of the consequences of any particular approach to advertising by lawyers, the current study and experimentation with alternative approaches, and the varying circumstances in different regions of the country.

Appellants' reliance upon the Sherman Act as an alternative basis for attacking the Arizona regulations should also be rejected. The challenged rules were adopted by the Arizona Supreme Court in 1970, and differ in certain important respects from the rules recommended by the ABA at that time. The Arizona rules thus represent the action of the State acting as sovereign and are therefore not cognizable under the antitrust laws. That the Arizona rules were generally modeled on proposals made by *amicus* American Bar Association is irrelevant. To fail to include these rules within the protection of the state action exemption to the antitrust laws by virtue of the fact that they were proposed initially by private parties would be directly to impinge upon the First Amendment rights of those private parties to petition the Government.

## ARGUMENT

### I. THE FIRST AMENDMENT DOES NOT REQUIRE EVERY STATE TO PERMIT UNRESTRICTED NEWSPAPER ADVERTISING OF THE PRICES OF PURPORTEDLY STANDARDIZED LEGAL SERVICES BUT RATHER ALLOWS THE STATES FLEXIBILITY IN DETERMINING PERMISSIBLE METHODS OF ENSURING PUBLIC AWARENESS OF THE AVAILABILITY OF LEGAL SERVICES.

Unrestricted newspaper advertising by individual practitioners constitutes only one potential device that might conceivably be used to enhance public awareness of the availability of legal services. The problem of determining which types of communications should be employed is a complicated one, which State regulatory authorities should be permitted to approach in a variety of ways consistently with the First Amendment.

#### A. States Have Broad Power To Regulate Advertising By Lawyers.

In two recent cases, the Court considered the applicability of the First Amendment to State laws prohibiting certain types of "commercial speech." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 96 S. Ct. 1817 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975). These decisions set forth the principles which should be controlling here—that commercial speech is subject to State regulation where justified by legitimate State concerns and that the special nature of professional services must be taken into account in assessing restrictions on advertising of such services.

In *Bigelow*, the Court held that a Virginia statute making it unlawful to prompt an abortion was unconstitutional as applied to an advertisement concerning the availability of

abortions in New York. While the Court pointed out that Virginia had no legitimate interest in the statute as applied since "Virginia possessed no authority to regulate the services provided in New York," the Court also held that "[t]he State, of course, has a legitimate interest in maintaining the quality of medical care provided within its borders." 421 U.S. at 824, 827. More recently, in the *Board of Pharmacy* case, the Court considered a Virginia statute prohibiting the dissemination of price information on prescription drugs. The statute was declared unconstitutional because the State had failed to offer any legitimate justification for the prohibition of such price advertising. 96 S.Ct. at 1829-30. Indeed, the implausibility of the reasons given by Virginia for the ban led to the conclusion that "the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have re-enforced our view that it is." 96 S.Ct. at 1830. As in *Bigelow*, the Court held that commercial speech is different from other forms of speech and "a different degree of protection is necessary . . ." 96 S.Ct. at 1830, n. 24. See also concurring opinion of Mr. Justice Stewart, 96 S.Ct. at 1832-35.

With respect to advertising by the professions, the Court noted that "consideration of quite different factors" would be called for. Physicians and lawyers "do not dispense standardized products," (96 S.Ct. at 1831, n. 25) and as a result, the "dangers of abuse and deception" may be greater at the professional judgment level, "when the advertised commodity [is] prescribed by a physician," than at the sale level when the commodity is "dispensed by a licensed pharmacist." 96 S.Ct. at 1822. See also concurring opinion of Mr. Chief Justice Burger, 96 S.Ct. at 1831-32.



The *Bigelow* and *Board of Pharmacy* decisions are thus consistent with earlier cases upholding restrictions on advertising by the professions. *Toole v. State Board of Dentistry*, 300 Mich. 180, 1 N.W.2d 502, appeal dismissed, 316 U.S. 648 (1942); *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935). Cf., *Head v. New Mexico Board*, 374 U.S. 424 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), also sustaining the constitutionality of State advertising prohibitions. The "balancing [of] interests" to which the Court referred in *Bigelow* (421 U.S. at 826) and the unique considerations relevant to ethical restrictions on professional conduct require that the restrictions now challenged be considered in light of the social objectives that they are intended to serve.<sup>1</sup>

The power of the States to regulate lawyer advertising is obviously far broader than the authority merely to prohibit announcements that may be misleading, confusing or non-informative. No one would seriously question the power of a State to prohibit an attorney from holding himself out as capable of influencing a tribunal through political, fraternal, religious, or family connections even if such communication was true. As noted in *Goldfarb v. Virginia State*

<sup>1</sup> Appellants seek to analogize the regulations challenged here to the types of State action considered in *NAACP v. Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar*, 389 U.S. 217 (1967); and *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971) (Appellants' Br. 38). See also Brief of Amici Curiae Consumers Union of United States, Inc. *et al.*, 6-10. However, the First Amendment rights considered in those cases are entirely different from the claims made here. Those cases concerned First Amendment freedom of association of unions and of other groups "to cooperate in helping and advising one another in asserting their rights" and "to act collectively to secure" counsel. *United Transportation Union*, 401 U.S. at 578-79. Since the present case does not concern any First Amendment claim other than the allegation that the public is deprived of certain commercial information, the principles of law which are controlling here are set forth in *Bigelow* and *Board of Pharmacy*.

*Bar*, 421 U.S. 773, 792 (1975), "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" Nor would anyone question the power of a State to prohibit the personal solicitation of clients in hospital wards, at accident sites, and in other situations where undue influence might be brought to bear by some, but not all, attorneys. Even appellants have conceded the undesirability of these practices.<sup>2</sup> Similarly, advertising intended to incite particular individuals to bring lawsuits against other named individuals would constitute the statutory crime of barratry in many States, and such practices may be contrary to the social policy of encouraging, wherever possible, the amicable resolution of controversies. Thus the prohibition of misleading or confusing communications, while important, is obviously not the exclusive legitimate objective of regulations which pertain to lawyer advertising.

**B. In Determining Appropriate Controls Upon Lawyer Advertising, State Regulatory Authorities Are Concerned With The Question Of How Information About The Availability Of Legal Services Should Best Be Disseminated.**

The question of lawyer advertising is only one aspect of the broader problem of how information about the availability of legal services may best be disseminated.<sup>3</sup> The solution involves the difficult reconciliation of competing

<sup>2</sup> See, Brief for the Appellants ("Appellants' Br."), 53; Testimony of Van O'Steen, Transcript of Proceedings before Special Local Administrative Committee of Arizona State Bar, April 7, 1976 ("Tr."), 56-58, 74-75.

<sup>3</sup> As explained more fully *infra*, the Arizona regulatory scheme now at issue contemplates a range of methods other than unrestricted newspaper advertising of individual practitioners by which information about legal services may be disseminated, including, *inter alia*, advertising by bar association lawyer referral services, group legal services programs, and public interest law firms.

social concerns. An important objective of a State's regulatory scheme should be to encourage the education of laymen to recognize their legal problems, to facilitate the process of intelligent selection of counsel, and to assist in making legal services fully available.

The interest of the public in achieving these objectives vastly outweighs the interest of attorneys themselves in being able to broadcast commercial messages intended to increase the "volume" of their business.<sup>4</sup> A lawyer is granted a license to practice by the State, and he holds a position of special trust and obligation. As the Court recognized in *Cohen v. Hurley*, 366 U.S. 117, 130 (1961), the permissible scope of burdens placed upon lawyers is significantly different from that of burdens ordinarily placed on individuals making constitutional challenges to State regulatory actions.

State regulatory authorities seek selectively to determine which practices may without adverse consequences enhance public awareness of the availability of legal services and contribute to the informed choice of counsel. It is no accident that every State, various federal agencies and many State and federal courts closely regulate advertising and solicitation by attorneys. This regulation is supported by a number of important State interests.

1. **Since Legal Services Are Not Standardized, Most if not All of the Information That a Lawyer Might Communicate to the Public at Large about His Abilities or Fees Would Be Non-informative or Non-comparative.**

The problems posed by lawyer advertising are not confined to communications that are *intended* to mislead or deceive. In contrast to the consumer of prescription drugs, who knows what he needs and can obtain the same drug of

<sup>4</sup> See, Appellants' Br. 8-9; Van O'Steen test., Tr. 78-79.

identical quality from any source, the consumer of legal services is unaware of what services he needs, and the quality of those services may vary substantially. Consequently, most if not all of the apparently truthful and seemingly straightforward information that a lawyer can disseminate about his abilities or fees is at best non-informative and at worst confusing and misleading.

For example, the publication of objective data on litigation results, although possibly truthful and not intended to deceive, may give rise to an unwarranted inference of exceptional ability. Yet such information is inherently non-informative or non-comparative. As every trial lawyer recognizes, the relative capabilities of attorneys cannot necessarily be determined from a comparison of data on litigation results since the outcome of any particular case depends on particular facts. Because the quality of legal services cannot be measured objectively, virtually every commentator who has considered advertising by attorneys has concluded that any advertisement claiming or implying the superiority of a particular attorney or attorneys properly may be proscribed as unfair or deceptive. The Department of Justice in its *amicus* brief herein does not dispute this view. See Brief of the United States as *Amicus Curiae* at 29.

The public's vulnerability to misinterpreting information is perhaps greatest with respect to fee information. In addition to the problems presented by attempts to advertise set, standardized fees for services which vary in nature and quality, less specific fee information also encourages misinterpretation. For example, hourly rates not only provide no information concerning the quality of services but also do not generally provide any meaningful indication of overall cost since the layman is unlikely to have an accurate impression of his needs and the services that must be per-



formed. Nor would a comparison of published hourly rates indicate which lawyer would perform services at the lowest cost, since the efficiency and experience of a lawyer are as important factors in total cost as his hourly rate.

Publication of contingent fees based on a percentage of recovery would pose similar problems. The announced percentage would say nothing about the amount and timing of the client's recovery. A lawyer can more easily advertise a low percentage if he follows a practice of settling many cases quickly. Whether this practice is good or bad is not clear. The point is that a consumer who is informed only of a percentage contingent fee does not receive meaningful or comparable information.

The problem of misinformation is even more severe with respect to the approach followed by appellants, who advertised their willingness to perform particular services for prescribed fees. Such advertising conveys nothing about the quality of such services and does not enable a consumer to judge whether the offered services are adequate for his needs.

Appellants' response is to assert that "some services, such as those advertised by appellants, are relatively standardized" and that this standardization eliminates differences in quality and the possibility of misunderstanding. (Appellants' Br. 45) This argument, however, overlooks the variables in particular cases that may complicate even matters which are seemingly routine.

For example, appellants' advertisement states that an "uncontested" divorce would cost \$175 plus \$20 court filing fees. However, as appellants have conceded, only upon consulting a lawyer might the clients realize that their "uncontested" divorce is not their exclusive legal need. A variety of problems, relating to alimony, life insurance, tax

refunds, tax liabilities, disposition of property rights, and child custody, are likely to arise in connection with a divorce—even in connection with a divorce that is "uncontested" in the sense that both partners seek termination of the marriage. (O'Steen test., Tr. 64-67)

An "uncontested divorce," in most situations, entails the performance of a variety of services other than the processing of court papers, which is apparently the only service appellants offer to perform for \$195. (O'Steen test., Tr. 63) Indeed, the processing of court papers is the most straightforward part of the lawyer's responsibility. Far more difficult is his diagnostic function, which he performs by asking his clients questions that would not occur to the layman. Only after such a consultation might the client realize that an "uncontested" divorce necessitated the drafting of an appropriate alimony or child custody and support agreement. To the extent that services of an attorney are necessary in these and other related matters, those services would not be covered by the advertised fee for an "uncontested divorce." The layman may be misled by the advertisement because he has no inkling whether additional services may be advisable, whether the advertising lawyer is able or willing to perform such services, or whether the cost of such additional services can be compared to alternatives.

Similarly, contingencies unforeseeable by the layman may complicate an "uncontested adoption" or a bankruptcy without "contested proceedings." Appellants' advertisement may well be truthful in the sense that *stated* services would be performed for the stated amounts if no additional services were required. But the layman cannot be assumed to know whether additional services are required until he has consulted a lawyer, who can assess the client's particular problem. Appellants testified that they would prepare a "simple will" for \$30. (O'Steen test., Tr. 67) This, too, if advertised



would be misleading to an individual who naively believed that a "simple will" was appropriate, even though he had no basis for accurately evaluating his own needs.

Finally, even the performance of precisely stated services of a routine nature can vary substantially in quality. For example, the timing of such services may be highly significant to a client. The lawyer who schedules a bankruptcy petition so that all claims are provable and therefore dischargeable or who assesses the federal tax laws when arranging the timing of a divorce or adoption has performed a very different "routine" service for his client.

If a layman were attracted to a lawyer by an advertisement of the type discussed above and discovered only after consulting with the attorney that his particular problem presented complications, the lawyer could either turn away the client (as is the practice of appellants, O'Steen test., Tr. 63) or could agree to perform the necessary services for an additional fee. The practice of performing additional or somewhat different services for an additional fee, despite a lower advertised fee, is a classic consumer protection problem. Yet, in the case of attorneys, this problem can not be as readily dealt with as the "bait and switch" tactics employed by certain retailers of consumer products.<sup>5</sup> Unlike such retailers, the attorney has an affirmative and countervailing obligation to provide additional services if appropriate for a particular client. How an attorney should respond to clients whose circumstances necessitate services more complex than those to be performed pursuant to an advertised offer is a difficult problem. The States are entitled to consider whether the dangers posed by the prob-

<sup>5</sup> Cf., Federal Trade Commission Guides against Bait Advertising, which provide, "No act or practice should be engaged in by an advertiser to discourage the purchase of the advertised merchandise as part of a bait scheme to sell other merchandise." 16 C.F.R. § 238.

lem together with enforcement difficulties outweigh the value, if any, of the particular form of advertising.

Appellants argue that their advertising of fixed fees is somehow analogous to the practice of quoting fees over the telephone. (Appellants' Br. 17) However, the problems of misinformation posed by appellants' newspaper advertisement are not presented by this practice. A lawyer who quotes an estimated fee over the telephone, like the lawyer who quotes an estimate during an initial office consultation, has an opportunity preliminarily to ascertain the client's particular needs and to provide any necessary qualification of his estimate.<sup>6</sup>

The problem of deception posed by advertisements containing fee information suggests why a State might reasonably determine that such information should generally be presented, as the Arizona regulatory scheme now contemplates, during a consultation, in person or by telephone, between lawyer and client. In this sense, the advertising restrictions here are the opposite of those considered in the *Board of Pharmacy* case. In that case, published drug price information was completely comparable, and no legitimate reason existed why price information could only be obtained "by shopping from pharmacist to pharmacist." 96 S. Ct. at 1826. Here, by contrast, personal consultation

<sup>6</sup> Appellants also seek to analogize their advertising of set fees to the arrangement under which attorneys participating in the State Bar-sponsored prepaid legal services program agree to limit their fees for services covered by the program to specified amounts. See also Brief for the United States as *Amicus Curiae*, 30-31. Clients of a prepaid legal services program, however, pay a fixed premium, which entitles them to any services covered by the program and are not induced to subscribe to the program by advertisements of particular services for standardized fees. Moreover, prepaid legal services programs are very closely regulated. In any event, the important question is not whether attorneys can under some circumstances estimate the average cost of certain services, but whether the advertisement of such an average to the public may be misleading.

may provide the only means by which accurate fee information can be obtained.<sup>7</sup>

In devising a satisfactory solution to the problem of increasing public awareness of the availability of legal services, State regulatory authorities should be entitled to consider whether announcements about lawyers' fees are inherently non-comparative and therefore do not facilitate the process of intelligent selection of counsel. This process may actually be hindered by such advertising since the public may be induced to select counsel on the basis of confusing information. Moreover, information on fees may not even be available from conscientious attorneys who wish to avoid such confusion and misunderstanding.

The overriding public interest in commercial speech is "that [private economic] decisions, in the aggregate, be intelligent and well informed." *Board of Pharmacy*, 96 S. Ct. at 1827. This interest is directly served not only by State regulation designed to ensure that commercial information is not false or misleading but also by regulation designed to ensure that the types of commercial information that are disseminated prove accurate or meaningful.

<sup>7</sup> The argument is offered in the Brief of *Amici Curiae* Consumers Union of United States, Inc. *et al.*, 9-10, that lawyers cannot constitutionally "be prevented from setting standard fees to be charged by the lawyers for specified services" in advance of a consultation with the client. They rely upon *United Transportation Union, supra*, for this proposition. In that case, however, the Court held only that the right of union members "to act collectively to obtain" counsel prevented the State from enjoining an arrangement under which attorneys whom the Union believed capable agreed that their fees to union members would not exceed 25% of an individual's recovery. 401 U.S. at 584-86. The extent to which a State may regulate the fees charged by attorneys is not at issue here. Rather, the questions herein relate to the permissible scope of the public advertising of such charges. It does not follow as a matter of law or logic that any lawful practice may lawfully be advertised. As explained *supra*, there are a variety of bases upon which a lawyer may lawfully calculate his fee, including hourly rates, but the advertising of such bases may pose the danger of misinterpretation and may properly be subject to State regulation.

## 2. The Disparity of Knowledge between Lawyer and Layman with Respect to Legal Matters Hinders the Layman in Accurately Assessing His Own Needs before Consulting a Lawyer and Thus Deprives Him of Information That May Be Essential to a Fair Analysis of Advertising Claims.

Although some general objective or problem commonly prompts the layman to seek the advice of an attorney, the layman depends upon the attorney not only to perform whatever services are necessary but also preliminarily to diagnose the layman's needs. Since the layman may thus lack critical information about his own circumstances before consulting a lawyer, the layman may lack the very knowledge which is necessary fairly to evaluate advertising claims.

Contrary to the simplified version of the lawyer's role implicit in appellants' arguments, in their description of their "systems approach" to the practice of law (*Appellants' Br.* 7-9), and in their advertisement itself, the lawyer, like the physician, is not merely a purveyor of services. Physicians and lawyers "do not dispense standardized products" but rather "render professional services of almost infinite variety and nature . . ." *Board of Pharmacy*, 96 S. Ct. at 1831, n. 25. Consequently, the task of assessing an individual's *particular* needs is at least as important as the actual performance of the appropriate services.

This diagnostic aspect of professional services distinguishes them from the types of services or products that are customarily advertised. Unlike the prospective purchaser of housewares or clothing or prescription drugs, the prospective purchaser of legal services is likely to have only a vague and possibly inaccurate perception of his needs. Without a satisfactory basis for assessing the relative sim-



plicity or complexity of his particular problem, the layman may lack information that is essential to a meaningful and fair evaluation of advertising claims.

At the threshold, the layman may be unable independently to determine even whether the assistance of a lawyer is necessary. For example, in Arizona, many changes of name are routinely effected without retaining counsel. Yet appellants' advertisement in this case offers a change of name for \$95 plus \$20 court filing fee, and appellants testified that clients responding to this advertisement would not necessarily be turned away. As O'Steen explained, "it's not my job to inform a prospective client that he needn't employ a lawyer to handle his work." (T. 72) Such a view is utterly inconsistent with the obligations and responsibilities of a professional.

Appellants defend this outlandish attitude by arguing that the "only meaning that can sensibly be ascribed to the term 'need'" is that "a person needs a lawyer when he feels the need of a lawyer's assistance in doing that which lawyers usually do." (Appellants' Br. 47) However, one obligation of an ethical attorney is to advise a client that he does *not* need an attorney to accomplish his end if such is the case. A person has traditionally been understood to need a lawyer's services when an attorney who is aware of the client's particular problems determines in the exercise of his independent professional judgment that services are warranted.

Advertising of purportedly standardized services at set fees may be used to encourage clients to ask for costly and superfluous services while at the same time, as the above example illustrates, decreasing the probability that an attorney will fulfill his "diagnostic" obligations or that a client will understand that he has such obligations. Preventing such a result is a legitimate concern of State regulation.

### 3. Advertising by Lawyers May Adversely Affect the Quality of Services Offered and the Structure of the Profession.

Widespread advertising of legal services and of fee information may affect the quality of such services by limiting the flexibility of the lawyer's response to the needs of individual clients. The lawyer who advertises his willingness to perform a particular function for a specified amount must have a preconception of the package of services which he expects to perform. Rather than turn away a prospective client who is unaware that the offered package is inappropriate for his special needs and rather than perform the needed services, the lawyer may provide the standard package, even if it is not an exact fit. While this may be particularly so in the case of the so-called "legal clinic," such as that operated by appellants, which relies so heavily on legal assistants (Appellants Br. 7; O'Steen test., Tr. 47-49), in the case of the individual practitioner, the announced willingness to perform specified services for specified fees also may lessen the likelihood of the services being adapted to the needs of the client.<sup>8</sup>

The quality of legal services provided would also be affected if the independent judgment of an attorney who

<sup>8</sup> The conscientious attorney recognizes that it is his responsibility to ascertain the precise needs of his clients and to provide services adapted to those needs. The question therefore arises whether the most competent attorneys, recognizing this professional responsibility, would be willing to advertise a "standardized" package of services, even if such advertising were permitted. Until 1959, attorneys practicing before the Patent Office were allowed to use advertising matter, circulars, letters, and cards to solicit patent business, provided copies were first submitted to the Commissioner of Patents for approval. Statements by three former Commissioners of Patents at the public hearings leading to the 1959 rule revision indicated that the services of the small percentage of practitioners who advertised were of poorer quality and more expensive than those rendered by other practitioners

(footnote continued on following page)



advertised were thereby compromised. Certainly, the independent judgment of an attorney may be affected by his desire to persuade a potential client to purchase his services. An attorney who seeks to convince someone to engage him before the attorney has been apprised of that person's particular situation is not exercising independent professional judgment, and it may be difficult for that attorney later to advise the client not to take the legal action which the attorney previously recommended. For example, an attorney who published an advertisement appealing specifically to victims of an alleged violation of antitrust, securities, or consumer protection laws would likely be hesitant candidly to advise clients thereby attracted that their claims were not meritorious even if his more complete knowledge of the facts so indicated.

This concern was recognized in *Cohen v. Hurley*, 366 U.S. 117, 124 (1960), where the Court noted that forms of advertising or solicitation may be "inconsistent with the personally disinterested position a lawyer should maintain." The problem is manifested in this case, since petitioners have conceded their reluctance to turn away a client seeking a name change who may respond to appellants' advertising but who may not require the assistance of counsel.

Every attorney can think of numerous instances in which the advertising of a standardized fee could affect profes-

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and more frequently occasioned client complaints. Hearing on Proposed Amendment of Patent Office Rule 1.345, U.S. Dept. of Commerce, at 188, 190, 196 (Nov. 19-20, 1957). Legitimate concern may exist about the capability and professional judgment of the attorney who would seek to take maximum advantage of the opportunity to persuade the public to purchase the services he offered. No one can predict whether this danger exists in all circumstances, but the States are certainly entitled to consider it.

sional judgment and the quality of legal services in both obvious and subtle fashions. For example, the advertising of a standardized will at a standardized fee may increase the danger that a particular client will accept, or that a lawyer will provide, such a will even though a more complicated will would be preferable. Few clients request "complex" wills, and even those with complex problems usually want something simple.

In addition to affecting the quality of services provided, advertising may also adversely affect the structure of the profession. In *Goldfarb*, the Court referred to the "public service aspect" of the professions that serves to distinguish them from other business activities.<sup>9</sup> Members of the profession, although profit-motivated, have a broad social responsibility. Because "lawyers are essential to the primary governmental function of administering justice," they have traditionally accepted the obligation to represent indigents and other persons unable to pay fees customarily charged. 421 U.S. at 792. This notion gives rise to the basic principle that fees, while obviously related to the services performed, should also reflect any peculiar circumstances including financial ability of a particular client. The increased rigidity of the fee structure to which widespread advertising of standardized fees would contribute may be fundamentally inconsistent with this recognized "public service aspect" of the legal profession. Once again, the States are entitled to consider this problem.

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<sup>9</sup> Specific examples of the public service aspect of the legal profession may be found in the record in this case. Certain members of the Arizona Bar were polled so as to determine their civic contributions through performance of services without or at reduced compensation, and the results are included in Bar Ex.17.

#### 4. The Interest of the States in Having Objective and Self-Enforcing Regulations Is Entitled to Great Weight.

While, in a theoretical sense, it may be desirable for all regulations imposed by the States to be as closely related as possible to the social concerns underlying the regulations, the States also have a legitimate interest in having regulations which are objective, which are self-enforcing, and which are practicable to police.<sup>10</sup> These criteria of practicability might not be satisfied by rules which seek to evaluate newspaper and other advertising on a case by case basis.

Even as to ordinary consumer products, the problem of deception and consumer misunderstanding has necessitated the promulgation by the Federal Trade Commission of frequent and minutely detailed trade practice rules.<sup>11</sup> Dangers posed by the advertising of legal services are substantially more complex, given the variables arising in individual circumstances, the public's lack of expertise as to legal matters, and the various problems discussed above.

Existing disciplinary resources are completely inadequate to police individual advertisements on a case-by-case basis. In addition, advertisements distributed through particular media, such as daily local newspapers, might escape the notice of State regulatory authorities. Moreover, any sub-

<sup>10</sup> An obvious example of a regulation that serves this governmental interest by drawing a bright line is Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), which prohibits a broad category of transactions in order to curb problems of insider trading. As noted in *Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418, 422 (1972),

"This approach maximized the ability of the rule to eradicate speculative abuses by reducing difficulties in proof. Such arbitrary and sweeping coverage was deemed necessary to insure the optimum prophylactic effect." *Bershad v. McDonough*, 428 F.2d 693, 696."

<sup>11</sup> Federal Trade Commission Guides and Trade Practice Rules for particular industries, occupying more than 800 pages, may be found at 16 C.F.R. §§ 25-259.

stantial volume of lawyer advertising would preclude satisfactory review of such advertising by State authorities.

Nor is it likely that adherence to regulations would be significantly encouraged by the threat of private actions. Apart from the possible reluctance of laymen to bring lawsuits against lawyers, the small amounts involved and the difficulty of proving actual injury caused by an improper advertisement make it unlikely that individuals' claims would be vindicated. Furthermore, if the consequence of the attorney's misconduct were misperformed services, for example, in connection with a simple will or an uncontested adoption, this may not become known for many years, further thwarting effective private enforcement.

The interest of the States in promulgating plain, enforceable regulations is closely related to the reasons why the overbreadth doctrine should not be applied to commercial speech. Nevertheless, the Department of Justice, while acknowledging that advertising by lawyers may be closely regulated (Brief of the United States as Amicus Curiae, 29-35), asserts that the Arizona rules are overbroad and suggests that such rules might be narrowed to prohibit only advertising that is "deceptive, misleading, unfair, undignified or likely to bring the legal profession into disrepute". (Brief of the United States, 22)

Not only are these suggested standards utterly unenforceable, but the existence of such imprecise rules would also encourage discriminatory and arbitrary sanctions against individual attorneys. Moreover, the imposition of sanctions pursuant to such standards would raise additional constitutional difficulties of vagueness and due process. In light of the inherent deception and unfairness of most advertising by attorneys and in light of the difficulties of enforcement, no regulatory body has adopted such vague rules. Instead,



numerous authorities, including various departments and agencies of the United States, whose regulations are neither discussed nor defended by the Brief of the United States, have wisely chosen clear, enforceable proscriptions.<sup>12</sup>

The problem of framing regulations that would authorize additional devices for informing the public about the availability of legal services and that would at the same time prevent potential abuses in a clear and enforceable manner is a difficult one and has contributed to the cautiousness of the States in modifying their regulations. The States are plainly entitled to consider the practical possibility of implementing the approach advocated by appellants in determining the forms of lawyer advertising that are to be permitted.

**C. Widely Varying Approaches Have Been Advocated And Followed In Connection With Expansion Of Ways In Which Information On Legal Services May Be Disseminated To The Public.**

Prompted by the growth of group legal services programs and other new methods of delivering legal services to the public, the States have in recent years experimented with a variety of approaches to the dissemination of information about the availability of legal services. Even among individuals who favor changing regulations on professional advertising, however, there is wide disagreement about the most advisable approach to be followed. Important differences among the proposals which have been advocated strongly support the position that great flexibility should be accorded the States to respond to the concerns discussed above.

<sup>12</sup> See, e.g., rules on advertising and solicitation applicable to attorneys practicing before the Department of Justice Immigration and Naturalization Service, 8 C.F.R. § 292.3(a)(5), (6); the Interstate Commerce Commission, 49 C.F.R. § 1100.13 and Appendix A to Part 1100, Rules 32-34; or the Internal Revenue Service, 31 C.F.R. § 10.30.

Differing views on this subject were fully aired during a series of hearings conducted by *amicus* American Bar Association in the fall of 1975. Among persons invited to testify were representatives of consumer groups, Justice Department officials, law professors, and State disciplinary authorities. While a few witnesses urged the removal of most restrictions on lawyer advertising, many of the witnesses supporting relaxation of these restrictions advocated a more selective approach. Some thought the best way to serve the public's need for additional information was to expand the categories of information that could be included in legal directories and law lists rather than to authorize unrestricted advertising by private attorneys. The contents of these directories could more readily be subjected to State supervision than could advertisements of low visibility published randomly by individual practitioners. Others favored increased efforts by bar association lawyer referral services to educate laymen through effective use of the media. Still other witnesses believed that advertising by private attorneys should be permitted, but that the permissible types of information and media should be specifically prescribed.

Following these hearings, the American Bar Association amended its model Code of Professional Responsibility, which it publishes as a recommendation to regulatory authorities. If adopted by a State, the rules now recommended by the ABA would permit the publication in a reputable law list, legal directory, or the yellow pages of a telephone directory of a variety of information, including whether credit cards or other credit arrangements are accepted, office hours, a statement of fees for an initial consultation, and the availability of other fee information on request, the request providing an opportunity for personal consultation. (ABA Code of Professional Responsibility, DR 2-102(A)(6)) This recommendation would significantly ex-



pand the information to be included in legal directories, including those prepared by consumer groups and more importantly, telephone directories. The classified section of the telephone book is a significant medium for consumers of legal services and is also a medium which permits efficient regulatory scrutiny. The ABA's recommended rule has not been adopted by Arizona, but even if adopted, it would not sanction an advertisement like that published by appellants in this case.

A somewhat different regulatory scheme, approved by the Board of Governors of the State Bar of California and now before the State Supreme Court, would also prohibit an advertisement like that published by appellants here. The proposed California rules on "public information communications" are also premised on the determination that law lists, legal directories, and telephone books, rather than individual advertisements, should be utilized to disseminate information about the availability of legal services.

The proposed California rules would also require that information be presented "in substantially the . . . form and language" set forth. (Rule 2-102(B)(3)) In this way, the rules seek to minimize the danger of deception otherwise inherent in announcements pertaining to subjects with which the layman is unfamiliar. For example, although the rules would permit the publication of information on hourly fees or on fees charged for specific types of services, they would affirmatively require that it be published "*together with all of the variables and other relevant factors that could affect the amounts of the stated fees.*" (Rule 2-102(B)(3)(m), (n)) In all, the rules would provide acceptable form and language for 38 categories of information, demonstrating the complexity of problems that may arise in connection even with what is seemingly a straightforward

and simple announcement. Problems of supervision and control, although not eliminated, would be somewhat more manageable if information to be published were thus limited with respect to form and language and were thus restricted to publication in a limited number of widely circulated directories. Both the new recommended ABA rules and the proposed California rules would draw a principled distinction between advertisements like appellants', which they would continue to prohibit, and other forms of information dissemination which they would authorize.

Still another approach has recently been proposed by the Board of Governors of the District of Columbia Bar and is now pending before the District of Columbia Court of Appeals.<sup>13</sup> It would prohibit a lawyer from making "false or misleading" representations (DR 2-101, 102) as well as from engaging in certain other practices, including soliciting or advertising "in any way that would violate a valid law or regulation, or a contractual or other obligation of the person through whom the lawyer seeks to communicate." (DR 2-103) In addition, the proposal would caution lawyers to disclose any "additional information that is accurate and that might assist a potential client in making an informed choice of an attorney", to "avoid creating unrealistic expectations", and "to provide information to the public in ways that comport with the dignity of the profession and that do not tend to demean the administration of justice." (EC 2-10) Given the likelihood of confusion or misapprehension presented by appellants' advertisement here, it may well be prohibited by these rules. In any event, the District of Columbia is the only jurisdiction actively considering such generalized prohibitions; and if these amendments are approved, the experience in this

<sup>13</sup> This proposal is reproduced in Appendix B to the Brief of the United States as *Amicus Curiae*.

single metropolitan area will be useful to State regulatory authorities in assessing the consequences of such modifications and the practicability of the guidelines set forth.<sup>14</sup>

**D. In View Of The Uncertainty That Exists About The Consequences Of Relaxing Restrictions On Advertising, The First Amendment Should Be Interpreted To Allow The States Great Flexibility In Developing Approaches To Advertising By Lawyers.**

Because of the lack of experience with advertising by lawyers, because of the uncertainty as to the consequences of removing existing restrictions, and because of the diversity of informed opinion as to the best method for increasing the dissemination of information, the States should be permitted to approach the question of lawyer advertising in a variety of ways. State regulatory authorities are able to take into account significant differences in the manner in which legal services are delivered in various regions of the country. Methods of informing the public about the availability of legal services which would be appropriate in New York or Los Angeles may well be inappropriate in Montana. Appellants themselves acknowledge that necessary means of informing the public about legal services may vary, de-

<sup>14</sup> Another approach to the question of "publicity and advertising" is suggested by the proposed rule contained in the Brief *Amicus Curiae* of the Chicago Council of Lawyers, Appendix A. This proposal would permit a communication "limited to one or more of" eight specified types of information. While the guidelines are not precisely defined, none of the permissible categories of information would seem to include an announcement like that of appellants. The Council's proposal also contains a number of general prohibitions, including a prohibition against the communication of "any estimate, promise or prediction of the result of any future legal proceeding" or "any comparative statement regarding any other lawyer" irrespective of accuracy. The rule would further require that all information be communicated "in a direct and readily comprehensible manner." A range of concerns is thus reflected in the Council's approach, some of which are additional concerns beyond those reflected in other proposals discussed *supra*.

pending upon the urban or essentially rural nature of the area. (Appellants' Br. 34-35) No rigid rule of constitutional law should discourage the diversity and experimentation in this area which the federal system would otherwise foster.

In recent decisions, this Court has recognized that the First Amendment should be interpreted so as to allow the States considerable latitude in formulating measures for dealing with types of speech reasonably deemed by the States to be incompatible with the public interest. For example, with respect to enforcement of obscenity laws, in *Miller v. California*, 413 U.S. 15, 32-33 (1973), the Court, while delineating a narrow category of speech under all circumstances entitled to protection, held that contemporary community standards rather than a national uniform standard could be followed:

"It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City . . . People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposing uniformity."

Similarly, recognizing the "strong and legitimate state interest in compensating private individuals for injury to reputation," the Court held in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood to a private individual."

The considerations underlying the *Miller* and *Gertz* decisions are even more forceful in the present context because those decisions did not involve economic regulation and "commercial speech" and because the States have "a



compelling interest in the practice of professions" and "broad power to establish standards for licensing practitioners and for regulating the practice of professions." *Goldfarb*, 421 U.S. at 792. The Court has consistently refused to strike down on broad constitutional grounds State regulations pertaining to professional or business conduct. *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156, 164-167 (1973); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220 (1949). In *Ferguson*, the Court upheld the constitutionality of the State statute prohibiting any person from engaging in the business of debt adjusting except as "the lawful incident of the practice of law." Emphasizing that a State has "broad scope to experiment with economic problems," the Court reiterated the principle that it "does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government. . . .'" 372 U.S. at 730.

Not to accord the States broad scope to deal with the problems of lawyer advertising would be to invoke the First Amendment in a manner long since rejected with respect to the Fourteenth Amendment. *Nebbia v. New York*, 291 U.S. 502 (1934). As the Court explained in *Ferguson*,

"... we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.'" 372 U.S. at 731-732.

The long tradition of restrictions on advertising by lawyers, the necessary uncertainty about the consequences of removing those restrictions, and the attention now being given these regulations by bar associations and State authorities

suggest that the wisdom of particular regulations and the approach to be followed in relaxing restrictions should be determined by the States.

**E. The Issue In This Case Is Whether The State Of Arizona Is Required By The Constitution To Permit Advertisements Like That Published By Appellants.**

Appellants' characterization of this case as involving the legality of a "total ban on advertising by private practitioners" (Appellants' Br. 2) can only serve to confuse the most important issue. A more accurate formulation of the question presented here is whether, as a matter of constitutional law, a State must authorize price advertisements, like that published by appellants, as a part of its regulatory scheme.

Although the Arizona rules do not permit such newspaper advertising, they provide for a number of other methods of disseminating information about the availability of legal services. For example, the Arizona regulatory scheme contemplates the existence of bar association lawyer referral services (DR2-103(C)); the dissemination of information about rights, remedies, and the availability of services by such lawyer referral services (DR2-103(D)(3));<sup>15</sup> the operation and promotion of group legal services programs (DR2-103(D)(4)); as well as the dissemination

<sup>15</sup> Appellants' own arguments demonstrate the effectiveness of advertising by bar association lawyer referral services in increasing public awareness of legal services. (Appellants' Br. 37-38) While serving an information function, such advertisements are able to avoid certain abuses resulting from direct and purposeful efforts by individual lawyers to persuade laymen to hire these particular lawyers. Although advertising by lawyer referral services is a recent development, almost 40 percent of the respondents in one national survey stated that they had heard of a lawyer referral service. Curran and Spalding, *The Legal Needs of the Public*, 89 (Am. B. Found. 1974).



of information through law lists, legal directories, and other announcements as set forth in DR2-102(A).

Moreover, in adopting its Code of Professional Responsibility, the Arizona Supreme Court added to the rules then recommended by the ABA a new subsection DR2-103(D) (5), which permits advertising by a public interest law firm. Under the Arizona rule, a non-profit firm which provides without cost or at reduced fees services that would not be provided by a governmental agency, which is approved by the Board of Governors of the State Bar, and which deals with problems of poverty law, individual civil rights law, public rights law, or charitable organization representation may promote the availability of its services without restriction. This rule is designed, in part, to permit the dissemination of information on "legal services in civil and criminal matters of importance to a client who does not have the financial resources to compensate counsel." (DR2-103(D)(5)(a)) The Arizona rules thus permit a category of advertising that would be prohibited under both the currently recommended ABA rules and the proposed California regulations. While these latter regulatory schemes would authorize some additional methods of disseminating information, neither set of rules would permit newspaper advertising of the type used by appellants here.

The question now presented, however, is not whether the States should or must sanction devices other than unrestricted newspaper advertising. Rather the narrow question before the Court is whether a State can constitutionally refuse to sanction unrestricted newspaper advertising of prices of purportedly standardized services. That the regulation challenged by appellants prohibits forms of conduct other than that in which appellants engaged is not directly relevant in assessing the constitutionality of an application of the Arizona regulation to their conduct.

Assuming *arguendo* that their own advertisement could have been properly prohibited by a narrower regulation, appellants nevertheless challenge the regulation on grounds of overbreadth.<sup>16</sup> (Appellants' Br. 51-54) The overbreadth doctrine has been invoked to strike down regulations that might chill ideological speech and that might be randomly and discriminatorily applied to censor unpopular views. See, Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 918-927 (1970).

The overbreadth doctrine loses much of its force when commercial behavior rather than ideological speech is at issue. Not only is there less likelihood that regulations concerning commercial behavior could be used discriminatorily to restrict the dissemination of unpopular ideas but also there is less likelihood of their having a chilling effect on commercial advertisers. As noted in the *Board of Pharmacy* case, "commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely." 96 S.Ct. at 1830, n. 24. Moreover, the public's interest in tolerating marginal conduct differs radically when commercial rather than ideological speech is involved.

An analogy may be drawn to statutes regulating the advertising of registered securities, which broadly prohibit all such advertising except in certain prescribed ways, such as by prospectus or by "tombstone" advertisement. Securities Act of 1933, 15 U.S.C. §§ 77b(10), 77(e). Such regulations are obviously "overbroad" in the sense that they prohibit the dissemination of certain helpful and informative mes-

<sup>16</sup> Appellants also invoke the least drastic means doctrine. (Appellants Br. 51-54) This Court has never held that either doctrine is applicable to "commercial speech" and to do so would severely undercut Congressional and State economic regulation.

sages that would not be in any way deceptive. Yet no one would reasonably suggest that the overbreadth doctrine should be available to challenge this regulatory scheme under the First Amendment. Although "overbroad," this scheme which regulates commercial speech is reasonable because it is, in the main, supportive of legitimate social ends and because it is justified by considerations of practicability. The rules of the Federal Trade Commission provide dozens of other examples of such "overbreadth." Indeed, economic regulations must be "overbroad" in order to be effective.

The great sweep of governmental authority to regulate "commercial and business affairs" even in the face of the First Amendment was recently noted by the Court:

"On the basis of [various unprovable] assumptions both Congress and state legislatures have, for example, drastically restricted associational rights by adopting antitrust laws, and have strictly regulated public expression by issuers of and dealers in securities, profit sharing "coupons," and "trading stamps," commanding what they must and must not publish and announce." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61-62 (1973).

Application of the overbreadth doctrine to commercial speech would invalidate numerous statutes and regulations governing advertising and undercut the power of Congress and the States effectively to regulate such advertising. The Court has never before held this doctrine applicable to economic matters such as advertising. The constitutional question presented by this case is not whether the Arizona rules are overbroad but whether there is any recognizable State interest supporting the prohibition of unrestricted newspaper advertising by appellants.

## II. THE SHERMAN ACT DOES NOT APPLY TO RULES ON LAWYER ADVERTISING WHICH HAVE BEEN ADOPTED BY THE SUPREME COURT OF ARIZONA.

Appellants' alternative basis for attacking the regulations under which they were disciplined is the Sherman Act. This challenge should be rejected since the regulations on advertising at issue in this case are contained in Rule 29(a) of the Rules of the Supreme Court of Arizona and are protected by a long-standing and well-recognized exemption from the federal antitrust laws, which prevents the application of the Sherman Act to a regulatory scheme imposed by a State acting as sovereign. *Parker v. Brown*, 317 U.S. 341 (1943).<sup>17</sup>

The suggestion has been made by appellants that the applicability of the *Parker* doctrine to the rules now challenged is somehow vitiated by the "private origin" of these regulations. (Appellants' Br. 60-64) They assert that the prohibition of lawyer advertising "originated with the private American Bar Association" (*id.* 60), and that this case may therefore be analogized to *Cantor v. Detroit Edison Co.*, 96 S.Ct. 3110 (1976).

<sup>17</sup> The United States in its Brief as *Amicus Curiae* acknowledges that the Arizona rule is outside the scope of the antitrust laws by virtue of the state action exemption to those laws, but nonetheless goes on to assert that the advertising ban "violates the substantive standards of the antitrust laws." (Brief of the United States, 12-15) In light of the plain application of the state action exemption and the fact that the present record contains virtually no factual or legal consideration of the "substantive standards of the antitrust laws," this *amicus* respectfully suggests that any such consideration should be deferred to other proceedings, including the action currently pending between the United States and the American Bar Association, No. 76-C-3475 (N.D. Ill., filed June 25, 1976). Accordingly, this Brief does not address such issues except to state that neither the case law nor economic analysis nor the record below supports the Government's blanket assertions.



In *Cantor*, the Court held that the antitrust laws were applicable to a light bulb program implemented by a Michigan utility pursuant to a tariff filed by the utility with a State commission regulating the distribution of electricity. In reaching this result, the Court relied upon the absence of "any statewide policy relating to light bulbs," the State's neutrality as to the desirability of the program, and the "freedom of choice" exercised by the private party. The Court pointed out that "[t]he distribution of electric light bulbs in Michigan is unregulated" and that the provision of light bulbs was a matter totally outside the regulatory interest of the Commission. In addition, other utilities regulated by the Commission did not follow the practice of providing bulbs to customers without additional charge. 96 S.Ct. at 3114. It was thus not the "private origin" of the program in *Cantor* that brought it within the sweep of the antitrust laws, as appellants now urge, but rather the failure of the State to have directed that such a program be implemented.

In the present case, by contrast, a statewide policy with respect to lawyer advertising has plainly been articulated by the State acting as a sovereign. Unlike the approval of the light bulb tariff by the Michigan Public Utility Commission in *Cantor*, the adoption of ethical rules by the Arizona Supreme Court was not a perfunctory act. To the contrary, the Arizona Supreme Court modified the recommended ABA rules, as explained *supra*, and has *twice* determined that the particular regulations now challenged serve the public interest—i.e., first when they were adopted and secondly during the proceedings below. Moreover, the regulatory scheme was initially imposed by order of the Arizona Supreme Court pursuant to procedures prescribed by statute (Ariz. Rev. Stat., § 32-231 *et seq.*).

Even without any legislative mandate, the highest court of the State could itself articulate statewide policy with respect to lawyer advertising which would constitute action of the State as sovereign. Unlike the Michigan Public Service Commission, which is a creature of the legislature, the Arizona Supreme Court is a separate and coordinate branch of government, which does not derive its inherent power from the legislature. As recognized by Chief Justice Marshall, the authority to regulate and discipline members of the legal profession has traditionally been considered "incidental to all courts." *Ex Parte Burr*, 22 U.S. (9 Wheat.) 529 (1824). *See, In re Bailey*, 30 Ariz. 407, 248 P. 29 (1926). *See also*, Appellants' Br. 61-62, n. 13. Thus, unlike the Michigan Public Service Commission, the Arizona Supreme Court had ample and specific authority to articulate State policy as to the matters with which the challenged regulations are concerned.

That the advertising rules now challenged may have been patterned after provisions of the model Code of Professional Responsibility drafted by *amicus* American Bar Association, a private, voluntary association, is irrelevant. The ABA first published its model Code in 1969, as a recommendation to State authorities responsible for regulating the professional conduct of lawyers. Many States have subsequently adopted ethical rules similar to those contained in the model ABA Code, although no State has adopted rules identical to those in the current ABA Code. The ABA does not enforce its model Code. Rather the ABA's role is comparable to the function performed by the American Law Institute in drafting and recommending uniform statutes.

Many of the regulations and statutes adopted by the federal government and by the States were proposed by private parties, exercising their rights under the First



Amendment. Appellants' notion that the state action exemption may somehow be lost where State regulatory action has been initially advocated by private parties would be directly inconsistent with the *Parker* decision itself—a case in which the challenged marketing plan was adopted upon the petition of private producers. 317 U.S. at 346-47. Appellants' argument would also be inconsistent with decisions of this Court holding that the federal antitrust laws must not be interpreted so as to interfere with legitimate efforts to influence governmental action. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).<sup>18</sup> There is no authority in *Cantor* or elsewhere for the notion that rules promulgated by the Arizona Supreme Court are cognizable under the antitrust laws merely because the Court's rules are modeled on proposals drafted by the American Bar Association.

Appellants also urge that the State regulatory scheme and the rules which it comprises should not be "automatically" exempted from the federal antitrust laws (Appellants' Br. 70), relying on dicta in *Cantor* that the *Parker* doctrine might not be invoked where a State's interest in a regulation is "peripheral or casual" or where the reasons for granting the antitrust exemption are "wholly unrelated either to federal policy or even to any necessary significant

<sup>18</sup> Appellants argue that "a private agreement by the American Bar Association and the State Bar of Arizona to prohibit price advertising is subject to the federal antitrust laws" and that "no immunity is gained by their success in having the prohibition written into the command of the Arizona Supreme Court." (Appellants' Br. 64) There is no evidence in the record of any such "agreement." Moreover, this argument relies upon a misrepresentation of the ABA's role in recommending a model Code of Professional Responsibility; it also formulates the applicable legal principles in a way that would broadly and directly impinge upon the First Amendment rights of private parties to petition the Government.

State interest." 96 S.Ct. at 3123. This language is plainly not controlling here, since, as explicitly recognized in *Goldfarb*, "the States have a compelling interest in the practice of professions within their boundaries. . . ." 421 U.S. at 792. Whatever may be applicability or inapplicability of the *Parker* doctrine in other contexts where the interest of the State is peripheral, it is clear that the interest of the States in the regulation of the ethical conduct of lawyers is sufficient to warrant applicability of the doctrine.

### CONCLUSION

Careful analysis of the recent *Bigelow* and *Board of Pharmacy* decisions reveals that no legitimate State interest supported the restrictions on advertising challenged in those cases. In sharp contrast, there is virtually universal agreement that advertising by attorneys poses serious and complicated problems and that close regulation of such advertising is supported by several substantial State interests. Disagreement exists only as to the precise type of regulatory system that is preferable as a matter of social policy. The American Bar Association has recently changed its recommended rules concerning advertising, and committees and members of the ABA continue to debate the optimal approach. Various States, such as Arizona, which have not adopted the ABA's recommendation hold still other views. This disagreement results from differences of opinion concerning the likelihood and magnitude of the purported advantages and dangers of advertising by attorneys. Put another way, there are important, legitimate State interests supporting Arizona's prohibition of price and other advertising by attorneys, but persons in good faith disagree as a matter of public policy concerning where regulatory lines should be drawn and the proper ranking of economic and regulatory priorities.

It is highly significant that the Department of Justice and other *amici* supporting some of appellants' contentions refrain from endorsing the actual conduct of appellants and instead focus on the alleged overbreadth of the Arizona system. The reason for this focus on the overbreadth doctrine is plain. Unless the Court is prepared to embark on a new course of judicial intervention into the economic regulation of advertising, appellants' conduct can be constitutionally prohibited. Not only are the dangers posed by appellants' particular advertisement sufficient by themselves to support a judgment by a State to prohibit such an advertisement, but appellants' admitted practice of advertising for clients and then neglecting to inform such clients that services may not be needed can be prohibited under a variety of constitutional and socially beneficial regulatory schemes.

In a sense, therefore, this case reduces to the question whether the Arizona rules governing advertising are invalid because they prohibit more than is prohibited by other rules in effect elsewhere or other rules recommended by the ABA or other organizations and entities. There is no decision of this Court requiring the application of the delicate and complicated doctrine of overbreadth to commercial speech, and such an application would directly interfere with countless examples of economic regulation by Congress and the States.

Under these circumstances, the judgment of the Supreme Court of Arizona should be affirmed.

December 17, 1976

Respectfully submitted,

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Supreme Court, U. S.  
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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1976

**No. 76-316**

JOHN R. BATES and VAN O'STEEN,

*Appellants,*

v.

STATE BAR OF ARIZONA,

*Appellee.*

On Appeal From the Supreme  
Court of Arizona

**BRIEF OF THE AMERICAN MEDICAL ASSOCIATION,  
AS AMICUS CURIAE, IN SUPPORT OF APPELLEE**

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**BRIEF OF THE AMERICAN MEDICAL ASSOCIATION,  
AS AMICUS CURIAE, IN SUPPORT OF APPELLEE**

**INTEREST OF AMICUS CURIAE**

The American Medical Association is the largest voluntary national professional association of physicians.\* Founded in 1846, the Association has a current membership of 215,000 physicians and serves as the representative of the medical profession in the United States and its Territories.

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\* This brief is submitted by the American Medical Association, as *amicus curiae*, with the consent of all parties pursuant to Rule 42 of the Court.

The objects of the American Medical Association, as written into the Association's Constitution more than a century ago, are "to promote the science and art of medicine and the betterment of public health." The American Medical Association and its members are dedicated to fostering the advancement of medical science and the health of the American people. One of the important activities of the Association in furtherance of its objectives and purposes is the development of professional standards of conduct promulgated as the Principles of Medical Ethics.

This case will have a profound impact on the activities of the American Medical Association and its members in carrying out self-regulation to assure quality medical services and the integrity of the medical profession. The issues presented in this case involve important questions of constitutional law and public policy. The Court's interpretation of the relationship between the public's right to know and traditional restrictions on professional conduct will of necessity affect the ability of medical associations and state regulatory agencies to regulate certain conduct of physicians. Both as an Association interested in the promulgation of ethical standards of conduct and as a representative of its members, *amicus* has a substantial interest in preserving regulation of the professions in the public interest.

### ARGUMENT

While the precise issue before the Court is the constitutionality of a state prohibition on price advertising by attorneys, this case raises the more fundamental question of how information concerning professional services can best be disseminated to the public consistent with the public interest. The decision of the Court will necessarily mandate general rules which will extend beyond the parties to all

institutions concerned about advertising or solicitation by professionals. This memorandum will, therefore, provide the perspective of the medical profession and will set forth the position of the American Medical Association. That position is contained in the Statement of the Judicial Council of the AMA regarding advertising and solicitation by physicians (April 9, 1976, attached hereto as Appendix A).

As the April 9 Statement of the Judicial Council recognizes, the public has a significant interest in receiving information about the availability of medical services. This information includes, *inter alia*, the following items:

1. The names of physicians;
2. The type of their practices;
3. The location of their offices;
4. Their office hours; and
5. The fees they charge, provided that disclosure is made of the variable factors that can affect such fees.

Dissemination of this information promotes informed choice of physicians by consumers and reasonable competition among physicians, two policies which the AMA has long supported. At the same time, however, the AMA opposes the serious dangers to the public welfare posed by unlimited advertising and solicitation by physicians.

One of these dangers is the potential for deception inherent in such advertising and solicitation. The First Amendment does not of course preclude prohibitions on false promotional statements. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 48 L.Ed. 2d 346, 364 (1976). Thus, a physician could be prevented from making the obviously misleading claim that his ineffective secret nostrums could cure a variety of serious diseases. But many forms of advertising and solicitation by physi-



cians involve not clear falsehoods, but subtle deception and adverse consequences to the public.

For example, the advertisement "Abdominal Problems Treated Without Surgery", even if true, may deceive the consumer into receiving inadequate medical care. The consumer, anxious about the potential seriousness of disquieting conditions and fearful of the pain and risks associated with surgery, is most vulnerable to promises of quick cures, painless remedies, or medically unjustified hopes held out by an advertiser who hasn't even conducted an individual examination.

And the consequences of deception may be horrible. By choosing the superficially appealing course prescribed by the huckster who promotes "Abdominal Problems Treated Without Surgery", a patient will forego the treatment that the ethical physician would have offered. In so doing, his condition might well worsen to the point that it becomes seriously aggravated or even incurable. In view of the vulnerability of consumers and the potentially tragic consequences of deception in this area, it is not unreasonable for a state to conclude that the public interest is best served by a clear, enforceable test proscribing certain easily-identifiable classes of professional advertising.

Take the case of price advertising at issue in this appeal. The difficulty of conveying complete information may well make an apparently truthful figure quite misleading. Thus, the average consumer will not recognize the ambiguities inherent in the claim, "Initial Office Visit—\$50". Will that visit include twenty minutes with the physician—or five? Will that visit include a thorough examination or merely the taking of a history with instructions to return in a week? Will the advertised price include laboratory tests, or will

these procedures cost extra? Unless disclosure is made of the answers to these and similar questions, "truthful" advertising will give consumers very limited information at best and will more probably mislead them.

The charlatan will be quick to seize upon the lawfulness of this form of unrestricted price advertising because it permits him to offer bargains more apparent than real. The ethical practitioner will not advertise prices unless disclosure can be made of the pertinent factors affecting the amount of any fee specified. Thus, he or she would not advertise the delivery of a baby for \$X without specifying whether the advertised fee included pre-natal and post-natal care, procedures necessitated by unforeseen complications, and similar factors.

In addition, price advertising may in borderline cases pressure the physician not to base the fee on the services performed but to base the services provided on the price advertised. Of course, if a physician determines that a blood test is necessary for the treatment of a patient, he will order the test regardless of any price he has advertised. If, however, the physician thinks that a blood test might be helpful but is not absolutely essential, he might hesitate to order the test where he has specified a price in advertising. And the foregoing of such a test might very well turn out to be contrary to the best medical interests of the patient.

As has recently been observed:

"Price advertising may lead to deterioration in quality and professional ethics. The individual patient has little information on the quality of any particular physician's service. If quality information is too hard to specify and to obtain . . . then . . . too much price consciousness . . . may lead to price competition and lower quality in general. This type of price competition

may even lead to deterioration of the ethical standards of the physician." Robert T. Masson and S. Wu, "Price Discrimination for Physicians' Services", 9 *Journal of Human Resources* 63, 73 (1974).

In short, price advertising can result in a decrease in the quality of care rendered to patients because in borderline cases it may lead to a standardization of service.

Or take the case of "truthful" testimonials. These are almost inevitably misleading because no two medical conditions are precisely alike. Even the most "routine" procedure, e.g. delivery of a baby, can sometimes involve serious complications. Thus, one person might quite honestly state that "Dr. Jones cured my problem in six weeks." But apart from the fact that the "cure" may be attributable to wholly natural causes and not to anything done by Dr. Jones, the fact that Dr. Jones cured one person in six weeks is irrelevant to what he can do for another person. The variety and complexity of symptoms, diseases and treatments make these sorts of testimonial likely to do no more than raise undue hopes in the minds of individuals. They raise the expectation that Dr. Jones will successfully treat all patients—even though the condition of any particular patient may be irremediable, not within the competence of Dr. Jones, or better handled by someone else.

Certain forms of advertising and solicitation, including unrestricted price advertising, tend to detract from the confidence which patients must place in physicians if medical care is to be effective. If the proper diagnosis is to be made, the patient must often trust the physician sufficiently to confide the most intimate details of his or her private life. Likewise, if a treatment is to be successful, the patient must often trust the physician sufficiently to follow a course of action which may be inconvenient, painful, and not immediately productive of observable results.

Physicians must constantly ask patients to submit to inconvenient, painful, and sometimes risky procedures. They must tell patients things which patients do not like to hear and often do not want to believe. Frequently, they treat patients who are upset and confused by undiagnosed and potentially serious symptoms and by procedures which are unknown and frightening to them. In these circumstances, treatment can only be effective if the patient is convinced that the physician is acting not out of commercial concerns but entirely out of a commitment to the welfare of his patient.

Trust is of course in large part a function of the individual physician and the individual patient. Through his character, action and judgment, a physician must earn the confidence of the patient. But trust is also a function of the esteem in which society holds physicians as a group. To the extent that "the public" perceives "physicians" as acting solely in the best medical interests of "patients", this relationship of trust is possible to attain. To the extent that the public perceives physicians as motivated primarily by profit maximization, this relationship becomes more difficult, if not impossible, to achieve. Harvard economist Kenneth Arrow put the point well when he wrote:

"As a signal to the buyer of his intentions to act as thoroughly in the buyer's behalf as possible, the physician avoids the obvious stigmata of profit-maximizing. Purely arms-length bargaining behavior would be incompatible, not logically, but surely psychologically, with the trust relations. . . . The very word, 'profit', is a signal that denies the trust relations." K. Arrow, "Uncertainty and the Welfare Economics of Medicine", 53 *Amer. Ec. Rev.* 941, 965 (1963).

Thus, in order to promote effective medical care, society has an interest in discouraging practices which undermine the physician-patient relationship.

## CONCLUSION

Medicine is a complex art based on often-not-well-understood scientific principles. Advertising in this highly sophisticated field raises considerations quite different from the advertising of consumer products and simple services. These considerations include a significant potential that some apparently truthful claims will mislead the ordinary consumer to his economic and physical detriment. They also include a substantial risk that some concededly non-deceptive statements can cause the quality of service rendered by physicians to deteriorate.

This memorandum has focused on advertising in the area of medicine, but the considerations discussed herein apply equally to the field of law. In proscribing unrestricted price advertising by attorneys in newspapers, the Arizona Supreme Court has weighed these considerations. It has also taken into account the difficulty of monitoring professional advertising and the availability of price information in media other than newspapers. The First Amendment should not prohibit a state from concluding that a clear, enforceable rule best serves the public interest.

In suggesting ethical standards for its members, the American Medical Association has taken a somewhat less restrictive approach (See Appendix A). But in the final analysis, the question is whether the First Amendment mandates any one solution to the problem of advertising by professionals. *Amicus* American Medical Association respectfully submits that the Constitution allows a range of choices. The need for more information to consumers is a real need, but it can be met by methods other than unrestricted advertising and solicitation. The Constitution does not require that millions of Americans be subjected to the risks of the marketplace without the protection of rigorous

state regulation and without standards of professional ethics.

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December 17, 1976



## APPENDIX A

Statement of the Judicial Council [of the American Medical Association], Re: Advertising and Solicitation

This statement reaffirms the long-standing policy of the Judicial Council on advertising and solicitation by physicians. The *Principles of Medical Ethics* are intended to discourage abusive practices that exploit patients and the public and interfere with freedom in making an informed choice of physicians and free competition among physicians.

Advertising—The *Principles* do not proscribe advertising; they proscribe the solicitation of patients. Advertising means the act of making information or intention known to the public. The public is entitled to know the names of physicians, the location of their offices, their office hours, and other useful information that will enable people to make a more informed choice of physician.

The physician may furnish this information through the accepted local media of advertising or communication, which are open to all physicians on like conditions. Office signs, professional cards, dignified announcements, telephone directory listings, and reputable directories are examples of acceptable media for making information available to the public.

A physician may give biographical and other relevant data for listing in a reputable directory. A directory is not reputable if its contents are false, misleading, or deceptive or if it is promoted through fraud or misrepresentation. If the physician, at his option, chooses to supply fee information, the published data may include his charge for a standard office visit or his fee or range of fees for specific types of services, provided disclosure is made of the variable and other pertinent factors affecting the amount of the fee specified. The published data may include other relevant facts about the physician, but false, misleading, or deceptive statements or claims should be avoided.

Local, state, or specialty medical associations, as autonomous organizations, may have ethical restrictions on advertising, solicitation of patients, or other professional conduct of physicians that exceed the *Principles of Medical Ethics*. Furthermore, specific legal restrictions on advertising or solicitation of patients exist in the medical licensure laws of at least 34 states. Other states provide regulation through statutory authority to impose penalties for unprofessional conduct.

Solicitation—The term “solicitation” in the *Principles* means the attempt to obtain patients by persuasion or influence, using statements or claims that (1) contain testimonials, (2) are intended or likely to create inflated or unjustified expectations of favorable results, (3) are self-laudatory and imply that the physician has skills superior to other physicians engaged in his field or specialty of practice, or (4) contain incorrect or incomplete facts, or representations or implications that are likely to cause the average person to misunderstand or be deceived.

Competition—Some competitive practices accepted in ordinary commercial and industrial enterprises—where profit-making is the primary objective—are inappropriate among physicians. Commercial enterprises, for example, are free to solicit business by paying commissions. They have no duty to lower prices to the poor. Commercial enterprises are generally free to engage in advertising “puffery”, to be boldly self-laudatory in making claims of superiority, and to emphasize favorable features without disclosing unfavorable information.

Physicians, by contrast, have an ethical duty to subordinate financial reward to social responsibility. A physician should not engage in practices for pecuniary gain that interfere with his medical judgment and skill or cause a deterioration of the quality of medical care. Ability to pay should be considered in reducing fees, and excessive fees are unethical.

Physicians should not pay commissions or rebates or give kickbacks for the referral of patients. Likewise, they should not make extravagant claims or proclaim extraordinary skills. Such practices, however common they may be in the commercial world, are unethical in the practice of medicine because they are injurious to the public.

Freedom of choice of physician and free competition among physicians are prerequisites of optimal medical care. The *Principles of Medical Ethics* are intended to curtail abusive practices that impinge on these freedoms and exploit patients and the public.

Journal of the American Medical Association, Vol. 235,  
No. 21, p. 2328, May 24, 1976

FOR ARGUMENT

UNITED STATES SUPREME COURT

Supreme Court, U. S.  
FILED

DEC 17 1976

MICHAEL RODAK, JR., CLERK

NO. 76-316

JOHN R. BATES

and

VAN O' STEEN

vs.

STATE BAR OF ARIZONA

BRIEF OF ROGER P. STOKEY

AS

AMICUS CURIAE IN  
SUPPORT OF APPELLEE

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### STATEMENT OF THE ISSUES:

The appellant has stated the issues as follows:

1. Does a total ban upon advertising by private attorneys, enforced by an integrated state bar and state supreme court, violate the First Amendment.
2. Does such a ban, originated by the American Bar Association and incorporated into a rule of the Arizona Supreme Court, violate the Sherman Act notwithstanding the state action exemption doctrine of Parker v. Brown, 317 U.S. 341 (1943)?

### STATEMENT OF THE CASE:

This case comes before the Court to review the action of the Supreme Court of Arizona which censured two (2) Phoenix lawyers for advertising their availability and charges in a newspaper. The case is admittedly designed to test the constitutionality of the rule against advertising.

### ARGUMENT

#### SUMMARY OF ARGUMENT:

Ordinarily consideration of whether advertising by members of the Bar should be permitted assumes that advertising will be helpful to the public. The undersigned submits that (1) such advertising will rarely, if ever, be useful, (2) in most (perhaps all) instances it will be inherently misleading, and (3) hence advertising by lawyers is appropriately forbidden - not to protect lawyers but to protect the public. The Bar can appropriately decide that these facts and as a service to the public forbid advertising. The action will probably be misunderstood; nevertheless the Bar should take this stand. Taking an unpopular stand is not a new experience

for the Bar.

I. ADVERTISING OF LEGAL SERVICES WILL  
RARELY IF EVER BE USEFUL.

Choosing a lawyer is difficult at best. Three (3) illustrations demonstrate this point.

First, every lawyer knows the difficulty of recommending a lawyer to handle a problem. Before replying to a request for a recommendation he asks many questions to learn as much as possible about the particular matter. What kind of a case is it? What are the facts? How much is involved? What degree of experience or expertise is needed? What is the difficulty of the matter? What complications are likely to arise? What kind of person is the client? Even after getting answers a lawyer is usually reluctant to suggest someone because he knows the variety of

factors involved.

Second, Courts have recognized the difficulty of evaluating past legal services when they have ruled upon fees. It goes without saying that evaluating service yet to be rendered is more difficult then. The many factors the Courts regularly consider in passing upon fees is indirect recognition of the many factors which go into determining an appropriate lawyer to handle a particular matter.

Third, the difficulty of making appropriate selections for the judiciary shows the difficulty of making an appropriate selection of a lawyer. More than a law degree is wanted. More than a law degree plus honesty is wanted.

Advertising by its very nature oversimplifies the difficult task of selecting

a lawyer.. Every experienced lawyer knows that one of the toughest problems of law is separating the simple from the complex, or in making complex appear simple. As Bar exams demonstrate, even recognizing the issues can be difficult. A lawyer knows that it may be cheapest to pay an apparently high hourly rate to get an expert who will make something simple. He knows of the botches created by lawyers who are not aware of complications. Who has not seen a will which was badly drawn by a lawyer? Unrecognized tax problems abound. Court cases are ineptly handled. Choosing a lawyer on a fee basis is an expensive right. The Bar is aware of the problem. It has an obligation to protect the public against such mistakes.

Consider for example, the ad of Bates & O'Steen - it reads in part:

"Divorce or legal separation-uncontested (both spouses sign papers) \$175.00 plus \$20.00 court filing fee".

An uncontested divorce can be a simple matter, but it may be a very complex problem. Should inexperienced laymen make the decision as to whether it is simple or complex? Should lawyers set up a system which can be a legal attractive nuisance? Should the Bar rely on the lawyers who place the ads to tell the persons attracted that although a divorce may be uncontested, and although both spouses may be willing to sign the papers, it is not simple because of children or because of property, or because of some other factor. Yet an uncontested divorce is the first item in the advertisement.

## II. ADVERTISING BY LAWYERS IS INHERENTLY MISLEADING TO LAYMEN.



Advertising by lawyers is inherently misleading to laymen. Although lawyers know that fees and hourly rates are only one factor in choosing a lawyer, the layman doesn't. Who would choose a surgeon for difficult surgery by competitive bidding? How does a layman choose a good dentist? Why are courts concerned about the quality of lawyers practicing before them? Why is the Bar concerned about continuing education?

An advertisement, however, necessarily suggests that the professional services of a lawyer should be chosen on the basis of the facts set forth in the ad. The ad may demonstrate the ability of the copy writer. It can tell the reader little or nothing about the person who will handle his case. It will suggest that certain factors are important, when

all lawyers know that many factors are important.

Even if an instance can be found in which an ad is not misleading, because the case described is in fact simple, it will suggest that other problems are also susceptible to such simple analysis. They are not.

### III. ADVERTISING BY LAWYERS IS APPROPRIATLY FORBIDDEN.

A State Bar or a State Supreme Court may reasonably conclude that advertising by lawyers rarely if ever serves a purpose, is ordinarily misleading to laymen, adds to costs and fees, and hence is appropriately forbidden.

The financial aspect of advertising has been ignored in this brief. However it is self evident that (1) large firms, whatever their merits, can by

pooling the efforts of lawyers get more expensive agencies and presumably more effective advertising (2) advertising will increase the cost of practicing law (3) advertising will add to legal fees. The public will pay more for the same service.

The difference in cars may be demonstrated by advertising. In such cases the public is educated. But advertising will not educate the public as to the difference between lawyers.

It is irrelevant that forbidding advertising by lawyers is misunderstood. The legal profession has an obligation to the public. This is well demonstrated by the attorney-client privilege, which belongs to the client, not to the attorney. The law gets blamed, but the public gets the benefit.

CONCLUSION:

Accordingly, the action of the Court below should be affirmed.

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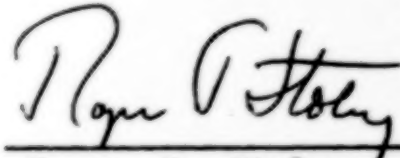
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CERTIFICATE OF SERVICE

December 16, 1976

I, Roger P. Stokey, certify that I served this Brief of Roger P. Stokey as Amicus Curiae by mailing copies thereof to William C. Camby, Jr., Esq., and John P. Frank, Esq.

  
\_\_\_\_\_  
Roger P. Stokey



FOR ARGUMENT

Supreme Court, U. S.  
FILED

DEC 17 1976

MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1976

No. 76-316

JOHN R. BATES and VAN O'STEEN,  
*Appellants,*

v.

STATE BAR OF ARIZONA,  
*Appellee.*

On Appeal from the Supreme Court of Arizona

**BRIEF FOR AMICUS CURIAE  
THE STATE BAR OF CALIFORNIA**

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1976

\_\_\_\_\_  
No. 76-316  
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JOHN R. BATES and VAN O'STEEN,

Appellants,

v.

STATE BAR OF ARIZONA,

Appellee.

\_\_\_\_\_  
ON APPEAL FROM THE SUPREME COURT OF ARIZONA  
\_\_\_\_\_

BRIEF FOR AMICUS CURIAE  
THE STATE BAR OF CALIFORNIA  
\_\_\_\_\_

INTEREST OF AMICUS CURIAE\*

Amicus curiae The State Bar of California (hereinafter "California Bar") is a public corporation which is, under California law, a component of the judicial branch of the state's government.

As such, the California Bar performs essential state governmental functions, including serving as an administrative arm of the Supreme Court of the State of California (hereinafter "California Supreme Court") in attorney admission, discipline and reinstatement matters. Cal. Const., art. 6, §§9, 6, 8; Cal. Bus. & Prof. Code, §§6001, 6008, 6008.1,

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\* The parties to this appeal have consented to the filing of a brief amicus curiae by The State Bar of California. A written stipulation evidencing their consent is on file in the office of the Clerk of this Court.

6008.2; Emslie v. State Bar (1974) 11 Cal.3d 210, 224 [13], 113 Cal.Rptr. 175, 520 P.2d 991; Brotsky v. State Bar (1962) 57 Cal.2d 287, 301 [12, 13], 19 Cal.Rptr. 153, 368 P.2d 697. With regard to matters of attorney discipline alone, the California Bar operates an elaborate disciplinary court system for the California Supreme Court, at an annual cost in excess of \$1.5 million. This cost is borne solely by the more than 54,000 members of the California Bar.

The California Bar is directed and managed by a Board of Governors (hereinafter "Board"), the members of which are public officers.\* Chronicle Publishing

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\* The Board consists of 15 attorney members elected from geographic districts by California attorneys, and 6 non-attorney members appointed from the state at large by the Governor. Cal. Bus. & Prof. Code, §§6011-6013.5.

Company v. Superior Court (1960) 54 Cal.2d 548, 566 [18], 7 Cal. Rptr. 109, 354 P.2d 637. The Board is specifically empowered by state law "[w]ith the approval of the [California] Supreme Court, . . . [to] formulate and enforce rules of professional conduct for all members of the bar in the State." Cal. Bus. & Prof. Code, §6076. The rules thus formulated, however, are not binding until approved by the California Supreme Court. Cal. Bus & Prof. Code, §§6076-6077. Upon such approval, they become rules of that court. Barton v. State Bar (1930) 209 Cal. 677, 680 [2], 289 P. 818.

The Board recently formulated and proposed to the California Supreme Court extensive -- and experimental -- revisions to California's Rules of Professional



Conduct designed to permit greater flow of information about what attorneys do and cost (Appendix A).<sup>\*</sup> These proposed revisions would permit information about many California attorneys to be published in expanded, non-traditional and readily-available law lists, legal directories and telephone books, with appropriate prescriptions concerning form and content to foster comparisons and prevent deception. These revisions will not become effective unless and until approved by the California Supreme Court. Even if so approved, their impact will be closely monitored

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<sup>\*</sup> These proposed new California rules are presently pending before the California Supreme Court for its consideration and eventual approval or disapproval. They were filed on August 26, 1976 under the title and number, In the Matter of the Proposed Repeal of Rule 2-106, Rules of Professional Conduct, Cal. Sup. Ct. Bar Misc. No. 3922.

for that court by the California Bar, since they are intended as an experiment to learn if more information about California lawyers can flow in different and heretofore unconventional media without detriment to the public and demoralization of California's legal profession.

By this brief the California Bar urges a decision in the case at bench which will foster and encourage the role of state bars in serving state judiciaries -- including healthy reappraisals and experimentation of the type now in progress in California -- while simultaneously protecting the other public interests involved in the instant controversy.

# PURPOSES OF THIS BRIEF

In furtherance of its just-described interest in preserving the essential role of professional organizations in the administration of justice, the California Bar urges two propositions in response to the First Amendment and Sherman Act challenges mounted by appellants against the Arizona rule prohibiting advertising and (more importantly) appellants' ultimate position that total deregulation of all professional solicitation and advertising by attorneys is constitutionally and statutorily required.

First, the California Bar submits that, even if the specific Arizona rule at issue here were to be deemed violative of the First Amendment, it would be essential that, in the course of invalidating the rule, credence not be given to the

possible conclusion that all restraints on hucksterism, ambulance chasing and hard-sell advertising techniques by attorneys are similarly invalid. Rather, the essential rule-making power of the state courts, assisted by administrative arms such as state bars, should be reaffirmed, with encouragement to such enterprises as the proposed California rules, in which the states reappraise and reweigh traditional standards against their own growing recognition of the need for further dissemination of information concerning the services and economics of the legal profession.

Second, it is urged that this Court refuse to extend the Sherman Act to embrace the activities of a state bar involved in formulating and proposing to the state's highest court rules of

professional conduct and thereafter enforcing the rules adopted by the state court. It should be held that such activity by a state bar is performance of an essential state governmental function, rendered as an integral part of the judicial branch of the state government.

## DISCUSSION

I. WHATEVER THIS COURT'S DECISION REGARDING THE PARTICULAR ARIZONA RULE AT ISSUE, THIS COURT SHOULD PRESERVE THE TRADITIONAL AND HISTORICAL RULE-MAKING POWER OF STATE COURTS, ASSISTED BY STATE BARS, TO REGULATE THE PROFESSIONAL CONDUCT OF ATTORNEYS ADMITTED TO PRACTICE BEFORE THEM

A. The State Courts' Inherent Rule-Making Power

State courts traditionally and historically have possessed inherent power to control the professional conduct of attorneys admitted to practice before them. See, e.g., Theard v. United States (1957) 354 U.S. 278, 281, 77 S.Ct. 1274, 1276 [3-7], 1 L.Ed.2d 1342; Brotsky v. State Bar (1962) 57 Cal.2d 287, 300 [6], 19 Cal.Rptr. 153, 368 P.2d 697; Stratmore v. State Bar (1975) 14 Cal.3d 887, 123 Cal.Rptr. 101, 538 P.2d 229. In many states (including California), one of the principal reasons for the existence of



a state bar is to assist the state courts in the exercise of that power.

Consequently, the sensitive issue of relationship between federal and state courts is inherent in the issues presented by the case at bench. As Mr. Justice Black, speaking for the Court, said in Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers (1970) 398 U.S. 281, 285-286, 90 S.Ct. 1739, 1742-1743, 26 L.Ed.2d 234:

"When this Nation was established by the Constitution, each State surrendered only a part of its sovereign power to the national government. But those powers that were not surrendered were retained by the States and unless a State was restrained by 'the supreme Law of the Land' as expressed in the Constitution, laws, or treaties of the United States, it was free to exercise those retained powers as it saw fit. One of the reserved powers was the maintenance of state judicial systems for the decision of legal controversies. . . ."  
(Emp. added.)

Shortly thereafter, the majority of this Court further articulated the reasons for avoiding unnecessary federal interference with state court actions, saying:

"This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses.

"What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

(Emp. added.)

Younger v. Harris (1971) 401 U.S. 37,  
44, 91 S.Ct. 746, 750-751, 27 L.Ed.2d  
669.

B. The California Bar's Proposed Rules:  
A Tangible Illustration of State  
Bar Assistance to the Judiciary in This  
Field

The proper and creative functioning of this purely state system of regulation is well illustrated by the California Bar's development of its proposed revisions to California's Rules of Professional Conduct in the area of public information communications by attorneys.

In a voluntarily-initiated, exhaustive study commenced more than two years ago,

the Board, inter alia:

1. Undertook an encyclopedic review and analysis of existing printed materials, including all California decisions involving solicitation of professional employment by attorneys and most other court decisions, law review articles and other treatises on the legal and social issues.
2. Directed a questionnaire to all California attorneys regarding their preferences and possible participation in directories and law lists which would include information on lawyers' (a) areas of experience or specialization, (b) fees and (c) interest in serving groups; and analyzed the 1,761 responses received.
3. Carefully reviewed the results of a long-range planning conference,

entitled "Law in the Future," to which national figures generously contributed.

4. Reviewed the transcript of debates on the issues held at two annual conferences of representatives from constituent bar associations.
5. Prompted debate of the issues and proposals at the California Conference of Bar Presidents.
6. Published for comment three separate, specific proposals for revising California's Rules of Professional Conduct.
7. Reviewed and analyzed the written responses to the issues and concepts espoused by the California Barristers Association (attorneys under 37 years of age), 38 local bar associations, 253 individual attorneys, the Los Angeles Regional Office of the

Federal Trade Commission, the Resource Center For Consumers of Legal Services, California legislators, three local government consumer affairs offices, a "legal clinic," 102 students enrolled in a college program on administration of justice and individual members of the public.

8. Reviewed and analyzed written comments on the specific text of the proposed revisions submitted by local bar associations, individual lawyers, California legislators, a law directory publisher, the Director of the State Department of Consumer Affairs and the California Newspaper Service Bureau.
10. Commissioned and studied a report by an advertising and public relations agency specializing in service



business on ways to implement and evaluate informative institutional advertising programs.

10. Held public hearings in Los Angeles and San Francisco, at which the Los Angeles County District Attorney, the Director and other representatives of the California State Department of Consumer Affairs, and representatives of local government consumer affairs departments, consumer organizations, California Rural Legal Assistance and other legal aid organizations, and local bar associations, inter alia, testified on both the general issues and the specific proposals being considered by the Board.
11. Held discussions with representatives of various media, including newspapers and the telephone company.
12. Listened to the comments of persons attending the Board's public meetings.

13. Continually publicized its efforts by issuing 30 news releases directed to public and legal newspapers, and public service radio announcements regarding its public hearings; circulating numerous letters to the presidents of all local bar associations; publishing articles in the State Bar Reports; and mailing one letter containing the text of the proposed revisions directly to all California attorneys.

When the Board's final formulation of its proposed revisions was filed with the California Supreme Court on August 26, 1976, it was accompanied by a foot-high record of the Board's development of its proposals.

The California Bar undertook this two-year task voluntarily in its capacity as an administrative arm of the California

Supreme Court. In effect, the Board acted as a master for that court, performing a task the court would have been able to perform itself only with the most oppressive difficulty and expense.

II. IN RECOMMENDING RULES OF PROFESSIONAL CONDUCT TO A STATE'S HIGHEST COURT AND ENFORCING THE RULES ADOPTED BY THAT COURT, A STATE BAR PERFORMS ESSENTIAL STATE GOVERNMENTAL FUNCTIONS AND ACTS AS AN INTEGRAL PART OF THE JUDICIAL BRANCH OF STATE GOVERNMENT

Recognizing the immunity of the Arizona Supreme Court under the "state action" doctrine enunciated in Parker v. Brown (1943) 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, appellants seek to impose antitrust liability\* on the Arizona State Bar for assisting the state court by (1) formulating the rule at issue and (2) conducting the disciplinary proceedings under it.

The California Bar respectfully cautions that adoption of that theory by this Court would have drastic and impolitic consequences, reaching far beyond the limited issue of attorney advertising

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\* Under 15 U.S.C., §§1 and 2.

and touching the very heart of the role of state bars as effective administrative arms of state courts, particularly in the disciplinary process.

If the California Bar, for example, were to be exposed to Sherman Act treble-damage lawsuits for actions taken by it in aid of the California Supreme Court (e.g., formulation of the proposed revisions already discussed or conducting attorney disciplinary proceedings), it simply could not function in the areas of attorney admission, discipline and reinstatement.\* The California Supreme Court would be effectively deprived of the administrative arm that

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\* The result would be a drastic vacuum in the attorney disciplinary process.

The California Bar receives and investigates over 5,000 disciplinary complaints against California attorneys each year.

(Footnote continued on next page)

the California Legislature has specifically created for it. Instead, the court

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(Footnote continued from preceding page)

For example, a survey of disciplinary matters pending before the California Bar on a single day (February 6, 1975) revealed the following:

<u>Disciplinary Matters Pending</u>	<u>Number</u>
At staff level	1,338
At preliminary hearing level	286
At trial hearing level	219
At disciplinary board level	69
TOTAL	<u>1,921</u>

A similar survey of disciplinary matters pending before the California Supreme Court on a comparable single day (January 7, 1975) revealed the following:

<u>Disciplinary Matters Pending</u>	<u>Number</u>
Proceedings originated by State Bar	43
Proceedings resulting from convictions of crimes	58
Resignations with charges pending	4
Revocation of license	1
Revocation of probation	1
TOTAL	<u>107</u>



itself would have to create, fund and operate its own mechanism to perform the functions formerly performed by the California Bar.\* The legal profession would no longer be involved in keeping its own house in order.

Surely Congress in enacting the Sherman Act, and this Court in interpreting it in the Parker case, supra, did not intend such a drastic and

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\* Application of the Sherman Act to the California Bar would effectively destroy the California Supreme Court's disciplinary machinery by bankrupting it.

At the present time the California Bar spends in excess of \$1.5 million on attorney discipline. These funds are derived entirely from membership fees. The state legislature has placed a ceiling on the California Bar's membership fees (Cal. Bus. & Prof. Code, §6140), and the California Bar has no power to additionally assess its members for any purpose. For some years now the California Bar's membership fees have been at the maximums allowed by the state legislature.

fundamental change in the manner by which ethical standards for attorneys are created and enforced throughout the United States. Fortunately, such an untoward result is neither compelled, nor even authorized, by this Court's prior decisions.

In the Parker case, supra, this Court expressly held that Congress did not intend the Sherman Act to invalidate restraints on competition imposed by states as sovereign acts of government. 317 U.S., at p. 352.

The California Bar respectfully submits that rules of professional conduct for attorneys are imposed and enforced by states as sovereign acts of government -- specifically, by the state judiciaries exercising their inherent or statutory power to govern the conduct of the attorneys whom they have admitted to practice before them. Therefore, the

state courts' antitrust immunity under the Parker case, supra, must apply to state bars, not only because their role in the attorney disciplinary process is wholly subordinate to, and subject to the plenary control of, the state courts, but also because state bar officers, appointees and employees are public officials.

For example, under California law, the California Bar performs essential governmental functions for the State of California by serving as the California Supreme Court's administrative arm in attorney admission, discipline and reinstatement matters, including, inter alia, formulating rules of professional conduct and conducting attorney disciplinary proceedings involving alleged violations of such rules.

This fact is expressed in the state constitutional and statutory scheme that provided for the creation and operation of the California Bar, i.e., it is a

constitutional public corporation within the judicial branch of the government of the State of California. Cal. Const., art. 6 (Judicial), §9; Cal. Bus. & Prof. Code, §6001.\*

The California Supreme Court has stated that "[t]he State Bar Act 'sets up an institution controlled and managed by the members of the profession who are public officers acting under oath without compensation and functioning as an arm or branch of this court in the matter of admissions, reinstatements and discipline of attorneys at law.'" (Emp. in original.) Chronicle Publishing Company v. Superior Court (1960) 54 Cal.

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\* See also Cal. Const., art. 6, §§6, 8; Cal. Bus. & Prof. Code, §6008 (all property of the California Bar is held for essential public and governmental purposes in the judicial branch of the state government, and such property is exempt from all state taxes); §6008.2 (evidences of indebtedness of the California Bar are issued for essential public and governmental purposes in the judicial branch of the state government).

2d 548, 566 [18]; see also 54 Cal. 2d, at p. 563 [11].

The California Legislature has expressly provided that the Board of Governors of the California Bar may formulate and enforce rules of professional conduct for all California attorneys only with the approval of the California Supreme Court. Cal. Bus. & Prof. Code, §§6076, 6002. (As the California Supreme Court has noted, "[t]he Rules of Professional Conduct are intended not only to establish ethical standards for members of the bar [citation omitted], but are also designed to protect the public. [Citations omitted.]" Ames v. State Bar (1973) 8 Cal. 3d 910, 917 [2], 106 Cal.Rptr. 489, 506 P.2d 625.) The California Legislature has further expressly provided that the rules thus formulated are not binding upon California attorneys until they have been approved by the California

Supreme Court. Cal. Bus. & Prof. Code, §§6076, 6077, 6002. The California Supreme Court itself has held that "[t]he Rules of Professional Conduct formulated by the Board of Governors of The State Bar, by the approval of the Supreme Court thereby became the rules of that court. . . ." Barton v. State Bar (1930) 209 Cal. 677, 680 [2], 289 P. 818.

In connection with enforcement of the rules so approved, the California Supreme Court has stated that "[b]y whatever name a [California Bar] disciplinary proceeding may be called, whether an action or special proceeding, it is in essence the initial stage of an action in [this] court."\* Brotsky v. State Bar

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\* Consequently, all actions taken by the California Bar in disciplinary  
(Footnote continued on next page)



(1962) 57 Cal.2d 287, 301 [14], 19 Cal. Rptr. 153, 368 P.2d 697.

In light of the state courts' own antitrust exemption, neither a state bar's role in assisting a state judiciary by formulating such rules for its consideration, nor a state bar's role in assisting a state judiciary in enforcing the rules ultimately adopted by the judiciary should expose such a state bar to liability under the Sherman Act. Otherwise, many state judiciaries will be wholly deprived of the invaluable administrative assistance they now receive from state bars in the vital areas of attorney ethics and discipline.

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(Footnote continued from preceding page)

matters are subject at any step to prompt, direct and plenary review by the California Supreme Court. Cal. Bus. & Prof. Code, §§6082-6084, 6087; Cal. Rules of Court, rules 951-952; Stratmore v. State Bar (1975) 14 Cal. 3d 887, 889 [1], 123 Cal.Rptr. 101, 538 P.2d 229.

## CONCLUSION

For the reasons briefly canvassed above, the California Bar respectfully urges that whatever disposition may be made of the specific, narrow rule challenged herein be carefully circumscribed to avoid creating the mistaken impression in some quarters that this Court has disregarded Mr. Justice Frankfurter's warning against burning the house to roast the pig.\* While reappraisal and experimentation by the states in this area may be desirable, a decision which would inspire in some minds the impression that an extreme, if opposite, evil has been reached -- in which all restraints are off and the morals of Madison Avenue are those of the legal profession -- would be no service to the public or its

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\* Butler v. Michigan (1957) 352 U.S. 380, 383, 77 S.Ct. 524, 1 L.Ed. 412.

structure for administering justice  
under a federal system.

The California Bar respectfully urges  
this Court to be cognizant of the concerns  
expressed above in deciding the case at  
bench and to preserve the traditional and  
historical power of the state courts to  
regulate the professional conduct of  
attorneys admitted to practice before them,  
as well as the vital role of state bars  
as administrative aids to state courts  
in this process.

Dated: December 15, 1976.

Respectfully submitted,

Edward L. Lascher  
Herbert M. Rosenthal  
Stuart A. Forsyth

Attorneys For Amicus Curiae  
The State Bar of California

Of Counsel:

Ralph J. Gampell, President  
The State Bar of California

## APPENDIX

**CALIFORNIA BAR'S PROPOSED REVISIONS TO**  
**CALIFORNIA'S RULES OF PROFESSIONAL CONDUCT**

**Rule 2-101. General Prohibitions Against Solicitation  
of Professional Employment.**

(A) A member of the State Bar shall not solicit professional employment. By way of example but without limiting the prohibition:

(1) A member of the State Bar shall not solicit professional employment in or about any prison or jail or other place of detention of persons, or the scene of any accident, or any hospital or sanitarium or other place of health care, or any court, or any public institution, or any public place, or any public street or highway, or any private institution or property of any character whatsoever, either personally or by use of any other person, firm, association, partnership, corporation or other entity or instrumentality acting on the member's behalf in any manner or in any capacity whatsoever.

(2) A member of the State Bar shall not solicit professional employment by compensating or giving or promising anything of value to a person or entity for the purpose of recommending or securing the member's employment by a client, or as a reward for having made a recommendation resulting in the member's employment by a client.

(3) A member of the State Bar shall not solicit professional employment by compensating or giving or promising anything of value to any representative of the press, radio, television or other communication medium in anticipation of or in return for publicity of the member or any other attorney.

(4) A member of the State Bar shall not solicit professional employment by recommending employment of the member or the member's partner or associate to a non-lawyer who has not sought the member's advice regarding employment of a member of the State Bar.

(5) A member of the State Bar shall not solicit professional employment by advertisement or other means of commercial publicity nor shall the member authorize or permit others to do so in the member's behalf.



(B) A member of the State Bar shall not accept employment when the member knows or should know that the person who seeks the member's services does so as a result of conduct prohibited under (A) of this rule.

(C) This rule does not prohibit the following identification of a member of the State Bar as such as well as by name and other reasonably pertinent data so long as such identification is not primarily directed to soliciting professional employment:

(1) In political advertisements;

(2) In public communications when the name and profession of a member of the State Bar are required or authorized by law or are reasonably pertinent for a purpose other than for the solicitation of potential clients;

(3) In or on legal documents prepared by the member of the State Bar;

(4) In routine reports and announcements of a bona fide business, civic, professional or political organization in which the member serves as a director or officer or other official capacity; and

(5) In or on articles, books, treatises, pamphlets, brochures or other such publications and in advertisements thereof.

#### **Rule 2-102. Public Information Communications.**

(A) A member of the State Bar may participate in the publication of any of the information about the member or the member's firm specified in (B)(3) of this rule in any of the following:

(1) Law lists and legal directories approved by the Board of Governors pursuant to the following criteria:

(a) The information published therein is substantially in the form and language specified in (B)(3) of this rule.

(b) Each such law list or legal directory is a separate collation which includes a reasonable number of attorneys (from different sole law practices, law partnerships, professional associations of attorneys practicing law together or law corporations), considering the size of the legal community and the field or fields of law involved, listed together under the title "Attorneys" or "Lawyers" and under such additional subclassifications (including, but not limited to, geo-

graphical areas in which members reside or maintain offices or regularly practice, fields of law or certified specialties) as are not likely to be misleading or injurious to the public or the profession.

(c) Preferential prominence is not given to any member listed therein, by different size or character of type, underscoring or any other method used for emphasis or to attract attention.

(d) The information itself and the manner in which the information is presented or distributed (i) are not false, fraudulent, misleading, deceptive or unfair, (ii) are not likely to mislead or deceive, whether because in context they make only a partial disclosure of variables and relevant facts, or for other reasons, (iii) do not contain laudatory statements about the member or the member's firm, (iv) are not intended or likely to create false or unjustified expectations of favorable results, (v) do not convey the impression that the member or the member's firm is in a position to influence improperly any court, tribunal or other public body or official, (vi) are not intended or likely to encourage a legal action or position being taken or asserted primarily to harass or maliciously injure another, (vii) are not intended or likely to appeal primarily to a person's fears, greed, desires for revenge or similar emotions, (viii) do not contain representations or implications that are likely to deceive or to cause misunderstanding, and (ix) are not for the primary purpose of obtaining professional employment of a particular member or member's firm for a specific matter or transaction.

(e) The law list or legal directory is published no more frequently than once quarterly.

(f) The law list or legal directory contains such explanatory information as the Board of Governors may prescribe from time to time for the protection of persons to whom the communications are addressed.

(g) The law list or legal directory clearly specifies for what period of time the information contained therein will be in effect.

(h) Law lists or legal directories may be published or distributed by commercial publishers of law lists or legal directories; bar associations; newspaper publishers; publishers of telephone directories; service clubs; charitable organizations; consumer organizations; labor unions; business, professional or trade

associations; and entities enumerated in Rule 2-104, provided the person or entity publishing the law list or legal directory files with the State Bar a certification that it will not arbitrarily, capriciously or unreasonably exclude any member of the State Bar from its law list or legal directory.

A member shall not participate in the publication of information about the member or the member's firm in any law list or legal directory which the member knows or should know does not comply with the requirements of this rule and has not been approved by the Board of Governors or has been subsequently disapproved by the Board of Governors. Applications for approval of law lists and legal directories shall be made on such forms and pursuant to such rules as adopted and as from time to time amended by the Board of Governors.

(2) Classified sections of the telephone directory or directories for the geographical area or areas in which the member of the State Bar resides or maintains offices or regularly practices law, provided:

(a) All listings of members and members' firms therein are in a separate collation listed together under the title "Attorneys" or "Lawyers" and, if under subclassifications, are only arranged according to fields of law in which the member or the member's firm concentrates, primarily engages, or will accept cases, or in which the member is a certified specialist.

(b) The information permitted in (B)(3) of this rule is presented in substantially the form and language set forth therein.

(c) Introductory paragraphs or footnotes include such explanatory information as the Board of Governors may prescribe from time to time for the protection of persons to whom the communications are addressed.

(d) The presentation of the information does not violate the provisions of (1)(c) or (d) of (A) of this rule.

(3) Law lists or legal directories published periodically by the State Bar.

As used herein, "fields of law" includes, but is not limited to, administrative agency law, admiralty or maritime law, antitrust law, (field(s) of) appellate practice, bankruptcy law, business law, (field(s) of) civil practice, civil rights law, condemnation law, contract law, copyright law,

corporation and partnership law, creditor's rights law, criminal law, debtor's rights law, education law, employment law, entertainment law, environmental law, estate planning, family law, general practice, immigration and naturalization law, juvenile law, labor law, landlord and tenant law, (field(s) of) malpractice law, patent law, pension and profit sharing law, personal injury law, probate law, real estate law, senior citizens law, social security law, taxation law, trademark law, (field(s) of) trial practice, trust law, unemployment insurance law, veterans law, welfare law, worker's compensation law, zoning law.

(B) A member of the State Bar may participate in the publication of any of the information about the member or the member's firm specified in paragraph (3) of this subdivision to the extent permitted in (A) of this rule and in Rules 2-103 and 2-104, provided:

(1) Both the information itself and the manner in which the information is presented or distributed (a) are not false, fraudulent, misleading, deceptive or unfair, (b) are not likely to mislead or deceive, whether because in context they make only a partial disclosure of variables and relevant facts, or for other reasons, (c) do not contain laudatory statements about the member or the member's firm, (d) are not intended or likely to create false or unjustified expectations of favorable results, (e) do not convey the impression that the member or the member's firm is in a position to influence improperly any court, tribunal or other public body or official, (f) are not intended or likely to encourage a legal action or position being taken or asserted primarily to harass or maliciously injure another, (g) are not intended or likely to appeal primarily to a person's fears, greed, desires for revenge or similar emotions, (h) do not contain representations or implications that are likely to deceive or to cause misunderstanding, and (i) are not for the primary purpose of obtaining professional employment of a particular member or member's firm for a specific matter or transaction.

(2) Only members who hold a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Board of Governors may use the terms "certified specialist", "specialist", "specialty", "specializes" or "specializing" in describing themselves or the nature of their practice; and only members who are registered to practice in patent matters before the United States



Patent and Trademark Office may use the words "patent" or "patents" in describing themselves or the nature of their practice.

(3) Such information is presented in substantially the following form and language:

(a) Name of the member of the State Bar;

*Form:* "[name of member]"

(b) Name under which the member practices, which may be accompanied by a statement clarifying that the practice is (i) a sole practice, (ii) a law partnership, (iii) an association of attorneys or (iv) a public interest law firm which has been ruled exempt from federal income tax under the Internal Revenue Code; provided that if the name under which the member practices is a law corporation, the statement clarifying that the practice is a law corporation shall be given and shall comply with the provisions of section 6164 of the Business and Professions Code;

*Form:* "[name of member's firm, e.g. 'Legal Clinic of Doe and Roe', 'Doe and Roe, Lawyers'], [a sole practitioner' or 'a law partnership' or 'an association of attorneys' or 'a law corporation' or 'public interest law firm']"

(c) The name(s) of predecessor law firm(s) in a continuing line of succession;

*Form:* "formerly: [name(s) of predecessor law firm(s) listed in reverse chronological order]"

(d) Address(es) and telephone number(s) of the office(s) maintained by the member or the member's firm for the practice of law;

*Form:* "[address(es)], [telephone number(s)]"

(e) Office hours regularly maintained by the member or the member's firm for the practice of law, and a statement that the member is available to meet with clients or potential clients at times other than the specified office hours;

*Form:* "office hours: [days and hours regularly maintained], [and/or 'by appointment']; [telephone answered:] [days and hours regularly answered or '24 hours']"

(f) A statement that the member is (or is not) willing to meet with potential clients at locations other than the member's office(s);

*Form:* "interviews ['not'] limited to office(s)"

(g) Language(s) other than English spoken fluently by the member;

*Form:* "fluent in: [name(s) of language(s)]"

(h) Language(s) other than English for which the member or the member's firm provides interpreter(s), and a statement whether such interpreter(s) are provided without charge;

*Form:* "[free] [name(s) of language(s)] interpreter(s) provided"

(i) Cost of an initial interview for a specified period of time, or a statement that such interview for a specified period of time is without charge;

*Form:* "initial interview: ['½ hour' or '1 hour' or other specified period of time], [dollar amount or 'free']"

(j) A statement that the member or the member's firm does (or does not) provide a written fee schedule, and if such fee schedule is provided a statement whether such fee schedule is provided without charge;

*Form:* "[free] written fee schedule available"

(k) A statement that the member or the member's firm is (or is not) willing to provide written fee estimates for specific services prior to providing such services, and if such fee estimates are provided a statement whether such fee estimates are provided without charge;

*Form:* "[free] written fee estimates given"

(l) Field(s) of law practiced by the member or the member's firm in which fees are set by statute;

*Form:* "[field(s) of law] fees set by statute"

(m) Hourly fee(s) or range of hourly fee(s) charged by the member or the member's firm, *together with* all of the variables and other relevant factors that could affect the amount(s) of the stated fee(s);

*Form:* "[hourly fee(s), together with all variables and relevant factors]: [dollar amount(s)]"

(n) Fee(s) or range(s) of fee(s) charged by the member or the member's firm for specific types of services, *together with* all of the variables and other relevant factors that could affect the amounts of the stated fee(s);



*Form:* "[type(s) of service(s), together with all variables and relevant factors]: [dollar amount(s)]"

(o) Type(s) of case(s) that the member or the member's firm is willing to accept on a contingency fee basis, *together with* the terms of a typical contingency fee contract (including, without limitation, how both investigation costs and litigation costs are computed and paid) *and* all of the variables and other relevant factors that could affect the stated terms;

*Form:* "contingency fee case(s): [type(s) of case(s)], [terms of contingency fee contract(s), together with all variables and relevant factors]"

(p) Name(s) of credit card(s) accepted by the member or the member's firm in payment of fees (or a statement that credit cards are not accepted);

*Form:* "[name(s) of credit card(s)] accepted"

(q) A statement that the member or the member's firm regularly accepts (or does not regularly accept) installment payments of fees on mutually satisfactory terms;

*Form:* "installment payments accepted on mutually satisfactory terms"

(r) A statement that the member or the member's firm is (or is not) willing to submit any fee dispute(s) to arbitration, and if so willing a statement that such arbitration is or is not binding;

*Form:* "fee disputes submitted to [binding] arbitration"

(s) A statement that the member holds current certificate(s) as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Board of Governors;

*Form:* "certified specialist in [field(s) of law]"

(t) A statement that the member is registered to practice in patent matters before the United States Patent and Trademark Office;

*Form:* "patents" or "patent law" or "registered to practice in patent matters"

(u) Field(s) of law to which the member and/or member's firm limits the member's and/or firm practice;

*Form:* "[lawyer's] [firm's] practice limited to: [field(s) of law]"

(v) One or more fields of law in which the member or the member's firm concentrates or primarily engages (not to exceed (i) in the case of a member, three, and (ii) in the case of a firm, three per member or ten, whichever is less);

*Form:* "[lawyer' or 'firm'] ['concentrates in:' or 'primarily engages in:'] [field(s) of law]"

(w) One or more fields of law in which the member or the member's firm accepts cases, *together with* the information set forth in (v) above;

*Form:* "[lawyer' or 'firm'] ['concentrates in:' or 'primarily engages in:'] [field(s) of law] and accepts cases in: [field(s) of law]"

(x) A statement that the member or the member's firm is interested in providing professional services under group legal services plan(s) which the member or the member's firm does not actually serve;

*Form:* "interested in serving group plans"

(y) A statement that the member or the member's firm is interested in providing professional services under prepaid legal services plan(s) which the member or the member's firm does not actually serve;

*Form:* "interested in serving prepaid plans"

(z) One or more fields of law in which the member and/or the member's firm will not accept cases;

*Form:* "[lawyer'] [firm'] will *not* accept cases in: [field(s) of law]"

(aa) Number of active members of the State Bar (including the member) who are associated with the member or the member's firm in the practice of law on a substantially full-time basis;

*Form:* "number of California lawyers: [whole number]"

(bb) Name(s) of (i) active member(s) of the State Bar who are, (ii) deceased member(s) of the State Bar who have been and (iii) with their consent, living member(s) of the State Bar who have been, associated with the member or the member's firm in the practice of law, and a statement with regard to each, that he or she is or was (i) a full-time partner, (ii) a full-time associate or (iii) has a continuing relationship with the member or the member's firm other than as a full-time partner or a full-time associate

("of counsel"), *together with* the pertinent dates with regard to any such member who is not currently associated with the member or the member's firm in the practice of law;

*Form:* "[partner(s):]" [name(s) and, if applicable, dates of former association in years];  
[associate(s):] [name(s) and, if applicable, dates of former association in years];  
[of counsel:] [name(s) and, if applicable, dates of former association in years]"

(cc) Date and place of the member's birth;

*Form:* "born: [date, place]"

(dd) State(s) and federal court(s) in which the member is entitled to practice law, *together with* the date(s) of admission to such practice;

*Form:* "admitted to practice in: [state, year]; [state, year]; [name of federal court, year]; [name of federal court, year]; [etc.]"

(ee) Name(s) of other professional license(s) currently or formerly held by the member, *together with* the state(s) issuing the license(s) and the pertinent dates;

*Form:* "other license(s): [official title or abbreviation of license(s) *currently* held], [state(s) of issuance], [first year of member's continuous holding of the license(s)] '-present'; [official title or abbreviation of license(s) *formerly* held], [state(s) of issuance], [dates in years that license(s) were held]"

(ff) Name(s) of school(s) from which the member has graduated, and with regard to each such school, a statement describing the nature of the school, the date the member graduated, the degree(s) the member received and any scholastic distinction(s) the member received;

*Form:* "[college' or 'law school' or 'engineering school' or other appropriate description of the nature of the school attended by the member]: [name of school, year of graduation, degree(s) received, official name or abbreviation of scholastic distinction(s) received]"

(gg) Official title(s) of public or quasi-public office(s) or post(s) of honor currently or formerly held by the member, *together with* the pertinent dates;

*Form:* "[official title or abbreviation of office(s) or post(s) of honor *currently* held], [year member's current term began] '-present'; [official title or abbreviation of office(s) or post(s) of honor *formerly* held], [dates in years that office or post was held]"

(hh) Name(s) of the branch(es) of the armed forces of the United States in which the member served, and the pertinent dates of such service;

*Form:* "[name(s) of branch(es)], [dates of service in years]"

(ii) Publication(s) authored by the member;

*Form:* "author: [title of work authored, title of publication, date of publication]"

(jj) Teaching position(s) currently or formerly held by the member, *together with* the pertinent dates;

*Form:* "[official title or abbreviation of position *currently* held], [name of school], [first year of member's continuous service in position] '-present'; [official title or abbreviation of position *formerly* held], [name of school], [dates in years that position was held]"

(kk) Name(s) of organization(s) or component(s) thereof to which the member belongs or belonged, and the pertinent dates of such membership;

*Form:* "member: [official name(s) or abbreviation(s) of organization(s) to which the member *currently* belongs], [first year of member's continuous membership therein] '-present'; [official name(s) or abbreviation(s) of component(s) of organization(s) to which the member *currently* belongs], [first year of member's continuous membership therein] '-present'; [official name(s) or abbreviation(s) of organization(s) to which the member *formerly* belonged], [dates of membership in years]; [official name(s) or abbreviation(s) of component(s) of organization(s) to which the member *formerly* belonged], [dates of membership in years]"

(ll) Name(s) of position(s) of responsibility currently or formerly held by the member in organization(s), *together with* the pertinent dates;

*Form:* "[official name(s) or abbreviation(s) of position(s) *currently* held] [first year of member's continuous service in position(s)] '-present'; [official



name(s) or abbreviation(s) of position(s) *formerly held*], [dates in years that position was held]"

(C) In addition to the conduct permitted by this rule, members of the State Bar and law firms may continue to be listed in a telephone directory, community directory or guide, law list or legal directory, or in a membership roster, membership register, membership directory or other membership list of a service club, charitable organization, fraternity, school alumni association or business, professional or trade association to which the member belongs, in the manner previously permitted by Rules 2-103(A)(5), (6) and (7) and 2-106(4) of the Rules of Professional Conduct extant immediately prior to effective date of this rule.

**Rule 2-103. Professional Announcements, Door and Office Signs, Professional Cards, Letterheads and Trade Names.**

Only to the extent permitted in this rule:

(A) A member of the State Bar available to act as a consultant to or as an associate of other members of the State Bar may distribute to other members of the State Bar and publish in legal journals circulated or distributed primarily to members of the State Bar or lawyers licensed in other jurisdictions an announcement in modest and dignified form of such availability setting forth any of the information permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein.

(B) A member of the State Bar or a member's law firm may mail to lawyers, clients, former clients, personal friends and relatives a brief professional announcement card in modest and dignified form stating new or changed associations or addresses, change of firm name, or similar matters, pertaining to the professional office of the member or of the member's firm and any of the information permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein. The announcement may be distributed only once for any new or changed association or address, change of firm name, or similar matters.

(C) A member of the State Bar or a member's law firm may have a sign in modest and dignified form on or near the door of the member's or firm's law office and in the building directory identifying the law office. The sign may state the nature of the practice only to the extent permitted under Rule 2-102(B)(3)(s), (t), (u) or (v) in substantially the form and language set forth therein.

(D) A member of the State Bar or a member's law firm may use a professional card in modest and dignified form and only for the purpose of identification. The professional card of a member may identify the member by name as a lawyer and give the member's address(es), telephone number(s) and give the name of the member's law firm in substantially the form and language set forth in Rule 2-102(B)(3)(b). The professional card of a law firm may give its name in substantially the form and language set forth in Rule 2-102(B)(3)(b) and may also give the names of members and associates. The card may state the nature of the practice only to the extent permitted under Rule 2-102(B)(3)(s), (t), (u) or (v) in substantially the form and language set forth therein.

(E) A member of the State Bar or a member's law firm may use stationery with a professional letterhead in modest and dignified form. The letterhead of a member may identify the member by name and as a lawyer and give the member's address(es), telephone number(s), the name of the member's law firm in substantially the form and language set forth in Rule 2-102(B)(3)(b) and the names of members and associates thereof. A letterhead of a law firm may give its name in substantially the form and language set forth in Rule 2-102(B)(3)(b) and may also give the names of members and associates, names and dates relating to deceased and retired members, and the names and dates of predecessor firms in a continuing line of succession. A member of the State Bar may be designated "of counsel" on a letterhead if the member has a continuing relationship with a lawyer or law firm other than as a full-time partner or associate. The letterhead may state the nature of the practice only to the extent permitted under Rule 2-102(B)(3)(s), (t), (u) or (v) in substantially the form and language set forth therein.

(F) A member of the State Bar who is engaged both in the practice of law and another profession or business shall not so indicate on his or her office sign, professional card or letterhead, nor shall the member identify himself or herself as a member of the State Bar in connection with the member's other profession or business.

(G) A member of the State Bar or a member's law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the member or the firm devotes a substantial amount of professional time in the representation of that client, provided the member of the State Bar uses such letterhead only for



correspondence relating to the professional representation of the client the member represents as general counsel unless the member performs no legal services for anyone other than the client the member represents as general counsel.

(H) A member of the State Bar or a member's law firm may practice under a fictitious name, provided that such name (1) includes the member's name or the name(s) of other member(s) of the State Bar who are associated with the member or the member's firm in the practice of law or the name(s) of deceased or retired member(s) of the firm or of a predecessor firm in a continuing line of succession or the name of a partnership within the meaning of (I) of this rule or, in the case of a law corporation, complies with the provisions of section 6164 of the Business and Professions Code, (2) is not false, fraudulent, misleading, deceptive or unfair, (3) is not likely to mislead or deceive, (4) does not contain laudatory statements about the member or the member's firm, (5) is not intended or likely to create false or unjustified expectations of favorable results, (6) does not convey the impression that the member or the member's firm is in a position to influence improperly any court, tribunal or other public body or official, (7) is not intended or likely to result in a legal action or position being taken or asserted primarily to harass or maliciously injure another, (8) is not intended or likely to appeal primarily to a person's fears, greed, desires for revenge or similar emotions, and (9) does not contain representations or implications that are likely to deceive or to cause misunderstanding.

(I) A partnership may be formed or continued between or among lawyers licensed in different jurisdictions, provided all enumerations of the members and associates of the firm make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions, and further provided that (1) each person occupying each office of the firm located in California who shall hold himself or herself out as a member or associate of such firm shall be an active member of the State Bar and (2) each person holding himself or herself out as a member of the firm shall be a bona fide partner in such firm, with a bona fide share in the profits, liabilities and professional responsibilities thereof and (3) at least one person occupying each office of the firm located in California shall be such a bona fide partner and an active member of the State Bar.

#### **Rule 2-104. Public, Group and Prepaid Legal Service Programs.**

(A) The participation of a member of the State Bar in a legal aid plan or program for the furnishing of services to indigents or pursuant to the plan or program of a non-profit organization formed for charitable or other public purposes which furnishes legal services to persons only in respect to their civic or political or constitutional rights and not otherwise in furtherance of such charitable or other public purposes of such organization, and the publicizing of such plans or programs are not, of themselves, violations of these Rules of Professional Conduct provided the name of such member of the State Bar is not publicized. Nothing in this rule shall prohibit a representative of such a plan or program from stating in response to inquiries as to the identity of such member of the State Bar any of the information concerning the member permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein.

(B) The participation of a member of the State Bar in a lawyer referral service established, sponsored, supervised and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California, as adopted and as from time to time amended by the Board of Governors is not, of itself, a violation of these Rules of Professional Conduct provided the name of such member of the State Bar is not publicized. Nothing in this rule shall prohibit a representative of such lawyer referral service from identifying a member of the State Bar who is participating in that service, and stating any of the information concerning the member permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein, in connection with the making of a requested referral in conformity with the said Minimum Standards. A member of the State Bar may permit his or her name to be listed in lawyer referral service offices according to the fields of law in which the member will accept referrals and in such manner as is proper under the standards which the Board of Governors may from time to time promulgate.

(C) The furnishing of legal services by a member of the State Bar pursuant to an arrangement for the provision of such services to the individual member of a group, as herein defined, at the request of such group, is not of itself in violation of these Rules of Professional Conduct if the arrangement:

(1) permits any member of the group to obtain legal services independently of the arrangement from any attorney of his or her choice,

(2) is so administered and operated as to prevent

(a) such group, its agents or any member thereof from interfering with or controlling the performance of the duties of such member of the State Bar to the member's client,

(b) such group, its agents or any member thereof from directly or indirectly deriving a profit from or receiving any part of the consideration paid to the member of the State Bar for the rendering of legal services thereunder,

(c) unlicensed persons from practicing law thereunder, and

(d) all publicizing and soliciting activities concerning the arrangement except by means of simple, dignified announcements setting forth the purposes and activities of the group or the nature and extent of the legal services or both, without any identification of the member or members of the State Bar rendering or to render such services.

Nothing in this rule shall prohibit a statement in communications to persons entitled to receive legal services under the arrangement or in response to individual inquiries as to the identity of the member or members of the State Bar rendering or to render the services giving any of the information concerning the member or members permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein.

As used in this rule, a group means a professional association, trade association, labor union or other non-profit organization or combination of persons, incorporated or otherwise and including employees of a single employer, whose primary purpose and activities are other than the rendering of legal services.

A member of the State Bar furnishing legal services pursuant to an arrangement for the provision thereof shall advise the State Bar thereof within 60 days after entering into the same. Thereafter the member shall advise the State Bar, on forms provided by it, of the following matters: the name of the group, its address, whether it is incorporated, its primary purposes and activities, the number of its members and a general description of the types of legal

services offered pursuant to the arrangement. Annually on January 31, the member shall report to the State Bar, on forms provided by it, any changes in such matters, and the number of members of the group to whom legal services were rendered during the calendar year. Each report filed pursuant hereto and the information contained therein, except the name and address of the group, the fact that it has an arrangement for the provision of legal services and the names of members of the State Bar providing such services shall be confidential.

(D) Section a. The furnishing of legal services by a member of the State Bar pursuant to an arrangement for pre-paid legal services or other plan for defraying the costs of professional services of attorneys, is not of itself in violation of these Rules of Professional Conduct, if:

(1) the arrangement was established by or at the request of a group defined in Rule 2-104(C) of these rules for the individual members of the group and otherwise complies with Rule 2-104(C); or

(2) the arrangement is developed, administered and operated by a non-profit organization, incorporated or otherwise and

(a) permits any client to obtain legal services independently of the arrangement, from any attorney of his or her choice; and

(b) is so developed, administered and operated that

(i) the panel of attorneys furnishing legal services thereunder consists of at least 20% or 1000 of the active members of the State Bar engaged in private practice and maintaining their principal offices in the geographical area served by the arrangement, whichever is the lesser number, but in no event less than 15 such active members; and

(ii) the panel of attorneys furnishing the legal services thereunder is open to any active member of the State Bar engaged in practice in the geographical area served by the arrangement, provided that a panel of attorneys which is open to all of the members of a local bar association is deemed to comply with this requirement if membership in that bar association is open to any active member of the State Bar engaged in practice in said geographical area, and



(iii) the client shall have the right to select any attorney on the panel to perform the legal services provided that the attorney consents to perform the legal services, and

(iv) any referral of a client to an attorney or attorneys on the panel of attorneys furnishing legal services under the arrangement shall be at the request of the client and in a manner consistent with those provisions of the "Minimum Standards for a Lawyer Referral Service in California" respecting the making of referrals; and

(c) is so developed, administered and operated as to prevent

(i) a third party from interfering with or controlling the performance of duties of the member of the State Bar to the member's client, and

(ii) a third party from receiving any part of the consideration paid to the member of the State Bar for furnishing legal services thereunder except as permitted by Rules 2-108 and 3-102 of these rules, and

(iii) unlicensed persons from practicing law thereunder, and

(iv) all publicizing and soliciting activities concerning the arrangement except by means of simple, dignified announcements setting forth the purposes and activities of the non-profit organization or the nature and extent of the benefits pursuant to the arrangement or both, without any identification of the member or members of the State Bar rendering or to render legal services; provided that all such publicizing and soliciting activities are in good faith engaged in solely for the purpose of developing, administering or operating the arrangement, and not for the purpose of soliciting business for, or for the self-aggrandizement of, any specific member or members of the State Bar; provided further that all publicizing and soliciting activities concerning the arrangement, except publicizing activities directed at persons entitled to receive legal services under the arrangement, shall terminate at such time as the total number of persons entitled to receive legal services under all arrangements of which the State Bar is advised pursuant to Rule 2-104(C) of these rules

is equivalent to the total number of persons entitled to receive legal services under all arrangements reported to the State Bar pursuant to Section b.1. (b) of this Rule 2-104(D). For the purposes of this subsection (c)(iv) "persons" shall not include those who are eligible to receive legal services solely by reason of being a spouse or dependent family member.

Once the requirements of Section a.2.(b)(i) of this Rule 2-104(D) have been satisfied, nothing in this rule shall prohibit a statement in communications to persons entitled to receive legal services under the arrangement or in response to individual inquiries as to the identity of the member or members of the State Bar rendering or to render the services giving any of the information concerning the member or members permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein.

As used in this section, "geographical area" means any one of the following: (1) the state; (2) one or more municipal court judicial districts; (3) any combination of one or more municipal court judicial districts together with one or more counties; (4) one or more counties; (5) one or more of the superior court districts in a county of 5,000,000 or more persons according to the latest federal census.

Section b. Subject to the provisions of Section c. of this Rule 2-104(D), a member of the State Bar who has agreed to furnish legal services pursuant to an arrangement for prepaid legal services or other plan for defraying the costs of professional services of attorneys, shall

(1) Within 60 days after entering into such agreement, file a notice thereof with the State Bar, and thereafter file with the State Bar, on the report forms provided by it and within 60 days after receiving such forms, the following under either (a) or (b), as applicable:

(a) If the arrangement was established by or at the request of a group pursuant to Section a.1. of this Rule 2-104(D):

(i) the name and office address of the group, the number of its members, its primary purposes and activities, and a copy of any agreement the member of the State Bar has entered into with the group respecting the arrangement;

(ii) if a person or entity other than the group itself is administering the arrangement, the name



and office address of such person or entity, whether such person or entity is incorporated, a copy of any agreement the member of the State Bar has entered into with such person or entity respecting the arrangement, and a copy of any agreement such person or entity has entered into with the group respecting the arrangement; and

(iii) a description of the methods and procedures under the agreement, if any, (A) whereby a client who is entitled to benefits under the arrangement may, upon request, be referred to an attorney or attorneys on the panel of attorneys furnishing legal services under the arrangement, (B) for periodically obtaining from those being served by the arrangement their comments, evaluations and recommendations respecting the operation of and furnishing of legal services under the arrangement, and (C) for resolution of client grievances.

(b) If the arrangement is developed, administered and operated by a non-profit organization pursuant to Section a.2. of this Rule 2-104(D):

(i) the name and office address of the non-profit organization and, if incorporated, a copy of its articles of incorporation and by-laws;

(ii) the geographical area served by the arrangement;

(iii) a copy of any agreement between the member of the State Bar and the non-profit organization respecting the arrangement;

(iv) the name and office address of any group being served by the arrangement, the number of its members, its primary purposes and activities, and a copy of any agreement the member of the State Bar or the non-profit organization, or both, has entered into with the group respecting the arrangement;

(v) if individuals, as distinguished from members of a group, are being served by the arrangement, then the number of such individuals and a copy of each form of agreement entered into between the non-profit organization and such individuals respecting the arrangement; and

(vi) a description of the methods and procedures under the arrangement, if any, as required under 1.(a)(iii) of this section.

(2) Annually thereafter, by January 31, file with the State Bar, on the report forms provided by it, the following: the number of persons to whom the member rendered legal services during the preceding calendar year pursuant to the arrangement, and the types of such services; and the changes, if any, in the information or documents the member filed with the State Bar under either 1.(a) or 1.(b) of this Section b.

Section c. Any notice, information or documents required to be filed by a member of the State Bar pursuant to Section b. of this Rule 2-104(D) need not be filed by such member personally if, within the time periods specified in that section, such notice, information or documents are filed on the member's behalf by either: (1) the group's officer, agent, or employee having primary responsibility for the arrangement established pursuant to Section a.1. of this Rule 2-104(D), or if such arrangement is being administered by a person or entity other than the group, by such person or entity; (2) the non-profit organization administering the arrangement pursuant to Section a.2. of this Rule 2-104(D).

When such notice, information or documents are so filed on behalf of two or more members of the State Bar for any one arrangement, they shall be consolidated where possible in a single notice or reporting form and documents already on file may be incorporated by reference so long as there are no changes therein.

Section d. Any notice, information or documents received by the State Bar pursuant to Sections b. or c. of this Rule 2-104(D) shall be public, whether or not also received by the State Bar pursuant to Rule 2-104(C) of these rules.

Supreme Court, U. S.  
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IN THE

**Supreme Court of the United States**

OCTOBER, 1978

No. 76-316

**JOHN R. BATES and VAN O'STEEN,**

*Appellants,*

v.

**STATE BAR OF ARIZONA,**

*Appellee.*

**ON WRIT OF CERTIORARI TO  
THE SUPREME COURT OF ARIZONA**

**BRIEF OF THE STATE BAR OF NORTH CAROLINA  
AS AMICUS CURIAE IN  
SUPPORT OF THE STATE BAR OF ARIZONA**

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JOHN R. BATES and VAN O'STEEN,

*Appellants,*

v.

STATE BAR OF ARIZONA,

*Appellee.*

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ON WRIT OF CERTIORARI TO  
THE SUPREME COURT OF ARIZONA

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BRIEF OF THE STATE BAR OF NORTH CAROLINA  
AS AMICUS CURIAE IN  
SUPPORT OF THE STATE BAR OF ARIZONA

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**INTEREST OF THE AMICUS CURIAE**

The questions presented at the case at bar apply equally  
to North Carolina and the North Carolina State Bar as to the

State of Arizona. North Carolina prohibits advertising or solicitation of any kind by attorneys through a variety of provisions. North Carolina General Statutes § 84-38 makes it a crime for any person or group, directly or indirectly, for themselves or for others, to solicit or procure through solicitation any legal business. In addition, North Carolina General Statutes § 84-28 provides that an attorney may be subject to disbarment, suspension for not more than three (3) years, public censure, or private reprimand for violating the Code of Professional Responsibility adopted and promulgated by the Council of the North Carolina State Bar. The North Carolina State Bar has adopted the Code of Professional Responsibility with its prohibition on most advertising and solicitation by attorneys. Pursuant to North Carolina General Statutes § 84-21, these rules must be and have been approved by the Chief Justice of the North Carolina Supreme Court and made official by their entry on the minutes of the Supreme Court of North Carolina.

If the advertising prohibition for attorneys in the State of Arizona is invalid, then in all probability the advertising prohibition for attorneys in the State of North Carolina is also invalid. North Carolina has substantial interests in assuring ethical and professional standards of its attorneys and in maintaining the effectiveness of the legal system. A decision in the instant case which, because of the similar provisions prohibiting most advertising by attorneys in the states of North Carolina and Arizona, indicated that the North Carolina advertising prohibition on attorneys was invalid would be inconsistent with the determination by the State of North Carolina that advertising prohibitions or restrictions on attorneys are essential for the legal profession and the legal system. Invalidity of the advertising prohibition would require a monumental task of re-structuring the methods of regulating attorneys' ethical and professional standards.

In addition, the prohibition on attorneys advertising in North Carolina is currently being challenged in the Eastern District of North Carolina in the case of *Williams, et al. v. North Carolina State Bar, et al.*, in which a three-judge court has been convened but no date has been set for briefs or arguments. That case, similarly to this case, presents the pure question of the validity of the prohibition against attorneys advertising by an attorney who advertised that he would provide uncontested divorces for \$100 plus \$18 court cost, by other attorneys who joined in the suit, and by consumers asserting their right to receive the information which attorneys might communicate to them in advertisements in the absence of the prohibition against attorneys advertising.

## QUESTION

### WHETHER STATES MAY PROHIBIT ATTORNEYS FROM ADVERTISING.

## SUMMARY OF ARGUMENT

It has long been established that the States have the authority and responsibility to regulate at least certain professions in the public interest and welfare. States have a particular interest and responsibility to regulate the legal profession because of the essential role that lawyers play in the administration and functioning of the legal system and because of the public service role of attorneys in the practice of law.

The policy against advertising is wide-spread and of long standing. It has its roots in the concept of law as a profession by which attorneys render a public service. Public confidence and trust are essential for the effective functioning of the legal system. Advertising would focus on matters which are often irrelevant to the choice of an attorney, to the

determination of whether and what legal services are involved, and to the evaluation of a particular attorney. The spectacle of attorneys advertising would emphasize the skill of, and money invested in, the advertising to the detriment of the public's view of attorneys. It would also encourage emphasis of public image and profit motive.

Advertising has also been long condemned because of its tendency to encourage the stirring up of litigation. Solicited claims are more likely to be fraudulent and are less likely to be meritorious than those that are initiated independently by the consumer. Public policy also favors peaceful settlement of disputes whenever possible, and advertising and solicitation would operate against this public policy.

Attorney advertising would also enhance advantages of the least scrupulous over the more ethically inclined and self-restrained attorneys. It would consequently divert clients to the least ethical and least desirable attorneys. The temptation on otherwise ethical attorneys to advertise in ways in which they would not normally be inclined to promote themselves or their services would be great because of the need to compete with the less restrained attorneys.

Advertising by attorneys would be inherently deceptive and misleading. It is impossible to know in advance all the legal services that a consumer might need, so the choice of an attorney by a consumer on the basis of the advertisement for a particular service would have a misleading and deceptive effect upon the client. Moreover, consumers cannot evaluate the quality of legal services, and advertising would contribute to their confusion in this respect.

Even price advertising is inherently deceptive and misleading. No legal services can be completely standardized, so one cannot know whether the price advertised by one

attorney for a particular service is comparable to the price advertised by another attorney for what is supposedly the same service. Advertising an hourly rate with a range of hours that might be involved is equally misleading since the consumer cannot know whether his needs will fall at the low or high point in the range of hours needed. A client does not know whether an attorney is a slow or fast worker, so a lower hourly rate for one attorney may actually end up in a higher cost than another attorney who charges a higher hourly rate.

If only misleading and deceptive advertising were prohibited, assuming that attorney advertising is not inherently misleading and deceptive, a method for enforcing the restrictions would have to be devised. The difficulty in determining which advertisements were misleading or deceptive would require a great deal of time and attention to the question of which advertisements should be prohibited. A system for enforcement of such restrictions would have to be established, requiring a great deal of manpower and expense. Even if a good job were done on policing advertisements, the deceptive or misleading character of many could not be established until after a consumer had suffered. It would be virtually impossible to provide for the compensation of consumers for losses resulting from misleading or deceptive advertising because of the problems of proof of the deceptive and misleading character of the advertisement, proof of causation, and proof of loss.

The removal of the prohibition on most advertising would also reek havoc within the profession. The cost of advertising would make it difficult for many attorneys to enter the field. The young attorney who can now begin to compete with a relatively small capital investment compared to many other professions would need the additional resources to advertise as much as or more than attorneys who have established reputations and are also advertising.



Moreover, the cost of advertising would increase the cost of legal services. Attorneys cannot achieve the same economies of scale that may be possible in commercial endeavors. Moreover, advertising of legal prices might lead to price cutting and price competition, the effects of which could include forcing attorneys either to suffer losses which could destroy their practice or to decrease the quality of services. Price cutting could also lead to supplying some services at a loss and thus overcharging clients who needed other services in order to make up the loss.

The advertising restrictions on attorneys do not violate the First Amendment. Although commercial speech has now been recognized as clearly protected by the First Amendment, advertising for commercial speech must be viewed differently from speech intended purely to communicate ideas for First Amendment purposes. In weighing the advertising restrictions against First Amendment interests, the special need and responsibility of the State to regulate professions, and especially the legal profession, must be considered. Advertising of legal services or legal fees differs from advertising of drug prices in that legal services are not prepackaged and are not easily defined and comparable as drugs generally are. Also, when a consumer is buying drugs he already has a prescription from a physician who has determined whether he needs medication and what medication is appropriate. When a consumer goes to an attorney, he may be attracted by an advertisement for a service which is not what he really needs and may be misled in his reliance on the advertisement.

Advertisement restrictions do not run afoul of the Sherman Antitrust Act. Advertising restrictions in most states, and specifically in both Arizona and North Carolina, are either embodied in statutory provisions or in rules of the State Supreme Court. As such, they represent the action of the State as a sovereign and are exempt from the Sherman

Antitrust Act under the *Parker v. Brown* so-called "State action" exemption. Even if the State action exemption were not considered available, the advertising prohibitions would have to be analyzed under the "rule of reason." The vital interests and policies promoted by State prohibitions on attorneys' advertising are reasonable and consequently could not violate the Sherman Antitrust Act.

## ARGUMENT

### THE STATES MAY VALIDLY PROHIBIT ATTORNEYS FROM ADVERTISING.

#### A. CASE LAW ON REGULATION OF PROFESSIONS.

The Authority of States to regulate professions has long been upheld by numerous decisions of the United States Supreme Court, the inferior federal courts, and the various courts of the states. In *Semler v. Oregon State Board of Dental Examiners*, this Court dealt with a challenge to the validity of statutory restrictions against advertising by Oregon dentists:

"We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a

public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards." *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086 (1935). See also *Williamson v. Lee Optical of Okalahoma*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

Similarly, this Court upheld a New Mexico restriction against advertising by optometrists which was designed to "protect . . . citizens against the evils of price-advertising methods tending to satisfy the needs of their pocketbook rather than the remedial requirements of their eyes." *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed. 2d. 983 (1963). In many similar cases, the Court has denied certiorari, affirmed without opinion, or similarly dismissed the appeal. E.g., *Dr. Bloom Dentist v. Cruise*, 288 U.S. 588, 53 S.Ct. 320, 77 L.Ed. 968 (1933) (per curiam; *Johnson v. Board of Dental Examiners* 134 F.2d. 9 (D.C. Cir. 1943), cert. den. 319 U.S. 758; *Toole, et al. v. State Board of Dentistry*, 300 Mich. 180, 1 N.W.2d. 502, app. dismissed 316 U.S. 648, 62 S.Ct. 1299 (1942). Moreover, a State's responsibility and broad authority to regulate professions for the protection of the public welfare and promotion of the public interest does not stop with the prevention of untruthful advertising. "In framing its policy the legislature was not bound to provide for determinations of the relevant proficiency of particular practitioners. The legislature was entitled to consider the general effects of the

practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule, even though in particular instances there might be no actual deception or misstatement." *Semler v. Oregon State Board of Dental Examiners*, 249 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086 (1935).

More than most professions, law has been recognized as an area in which the State has a particular duty and authority to exercise its control over the standards of the profession.

"History and policy combine to establish the presence of a substantial state interest in conducting an investigation of this kind. That interest is nothing less than the exertion of disciplinary powers which English and American courts (the former primarily through the Inns of Court) have for centuries possessed over members of the Bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied. . . . It is no less true than trite that lawyers must operate in a three-fold capacity, as self-employed businessmen as it were, as trusted agents of their clients, and as assistants to the courts in search of a just solution to disputes." *Cohen v. Hurley*, 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed. 156 (1962).

"We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interest they have broad power to establish standards for licensing practitioners and regulating the practice of professions. . . . The interest of the

States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed. 2d. 572 (1975).

Since lawyers are officers of the courts, the State should have control over those persons granted the privilege of becoming lawyers and thereby becoming instruments "to advance the ends of justice." *Theard v. United States*, 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed. 1342 (1957). See also *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 91 S.Ct. 720, 27 L.Ed. 2d 749 (1971); *Application of Stolar*, 401 U.S. 23, 91 S.Ct. 713, 27 L.Ed.2d. 657 (1971); *Baird v. State Bar of Arizona*, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971); *Sperry v. Florida*, 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed. 2d. 428 (1963); *Konigsberg v. State Bar of California* 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed. 2d. 810 (1957); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed. 3d. 796 (1957).

#### B. THE POLICY AGAINST ADVERTISING: JUSTIFICATION

The policy against advertising is widespread and of long standing. It has its roots in the concept of the practice of law as a profession and in the legal profession's view of the role it plays in society.

"Historically, the practice of law is a profession. It must remain a profession if the purposes of representation in litigation as part of the machinery of justice are to be achieved. A profession is a group of men pursuing a learned

art as a common calling in the spirit of public service—no less a public service because incidentally it may be a means of livelihood. . . . In a profession, on the other hand, it [the gaining of a livelihood] is an incidental purpose, pursuit of which is held down by traditions of a chief purpose to which the organized activities of those pursuing the calling are to be directed primarily and by which the individual activities of the practitioner are to be restrained and guided. . . .

"There is no such thing as competition for clientage in a profession. Every lawyer should exert himself fully to do his tasks of advice, representation, and advocacy to the best of his ability. But competition with fellow members of the profession in any other way is forbidden. Competition belongs to activities which are primarily acquisitive. It is not allowable in those primarily for public service." R. Pound, *Jurisprudence*, 676-77.

And Dean Witmore has similarly stressed the importance of the concept of law as a profession:

"For lawyers, the most important truth about the law is that it is a profession. . . . As a profession, the law must be thought of as ignoring commercial standards of success—as possessing special duties to serve the state's justice—and as an applied science requiring scientific training. And, if it is thus set apart as a profession, it must have traditions and tenets of its own, which are to be mastered and lived up to. This living spirit of the profession, which limits yet uplifts it as a livelihood, has been customarily known by the vague term 'legal ethics.' There is much more to it than rules of ethics. There



is a whole atmosphere of life's behavior. What is signified is all the learning about the traditions of behavior that mark off and emphasize the legal profession as a guild of public officers. And the apprentice must hope and expect to make full acquaintance with this body of traditions, as his manual of equipment, without which he cannot do his part to keep the law on the level of a profession." (Foreword to Carter's, *The Ethics of the Legal Profession*, 1915).

The essential link between law as a profession and the prohibition on advertising and solicitation have been recognized by countless commentators and in countless cases over the years. See e.g., *Jacksonville Bar Association v. Wilson*, 102 So.2d. 292 (1958); *In re Rothman*, 12 N.J. 528, 97 A.2d. 621 (1953); *in re Cohen*, 261 Mass. 484, 159 N.E. 495, 55 A.L.R. 1309 (1928); *In re Schwarz*, 195 App. Div. 194, 186 N.Y.S. 535 (App. Div. 1921), affirmed 231 N.Y. 642, 132 N.E. 921 (1921). Nor is the view confined to the United States. "There are rules of conduct which all professional men must observe. Refraining from advertising would, I think, clearly be one." F. A. R. Bennion, *Professional Ethics: The Consultant Professions and Their Code*, p. 149 (1969). However, it is not enough simply to assert that a prohibition or at least restriction on advertising is essential to the preservation of the practice of law as a profession and its integrity. It is necessary to go further and establish the link between this concept and the benefits which redound to the public, both directly and indirectly. The concept of lawyers as members of a profession:

"...is not a fancied conceit, but a cherished tradition, the preservation of which is essential to the lawyer's reverence for his calling—as well as to his regard and esteem for his fellows at the Bar.

This latter consideration is much more potent than is commonly supposed. Although, prompted by material success, some lawyers may profess indifference to the good opinion of their fellows, actually none is thus indifferent, but each craves such recognition, the more strongly the older he grows.

"Furthermore, advertising, solicitation, and encroachment on the practice of others does not tend to benefit either the public or the lawyer in the same way as in the case of the sale of merchandise. While extensive advertising would doubtless increase litigation, this has always been considered as against public policy. Also, many of the most desirable clients, imbued with high respect both for their lawyer and his calling, would have no use for a lawyer who did not maintain the dignity and standards of his profession and would instinctively resent any attempt by another lawyer to encroach on their relation. Also, in so much as lawyers are officers of the court, advertising and solicitation by them would lower the whole tone of the administration of justice.

"Reasons frequently given for the rules proscribing advertising and soliciting are, in addition to commercializing the profession, the tendency of such practices to stir up litigation, the evil effect on the ignorant of alluring assurances by the solicitous, as well as the temptation and probability that the lawyers who advertise and solicit would use improper means to make good their extravagant inducement."

Henry S. Drinker, *Legal Ethics* pp. 211-12 (1953).

Public confidence and trust in lawyers are essential to the profession. Lawyers deliver a specialized service which cannot readily be evaluated by the average person. The legal profession can function as it should only if the public has the confidence and trust which will lead it to turn to lawyers when a legal problem arises or may exist. Will the public retain this confidence and trust, or be likely to develop it, if a lawyer can "advertise his talent, skill, and ability as merchants advertise their wares, much less call for business like a chimney sweeper"? *In re Greathouse*, 189 Minn. 51, 248 N.W. 735 (1933) (per curiam). Will the public believe an attorney is motivated by the spirit of public service and the considerations of fiduciary obligation obligatory on the effective functioning of the legal profession and the system of the administration of justice if the attorney is advertising and thus emphasizing a profit motive rather than the public service spirit? See Note, "Advertising, Solicitation and Legal Ethics," 7 Vanderbilt L. Rev. 677, 684 (1954).

Advertising focuses attention on images and on inducements which are expected to bring in business, not necessarily on the factors which should be of primary significance in determining whether a lawyer is needed and which lawyer should be consulted. According to Dr. Johnson, "Promise, promise is the sole of an advertisement." Bennion, *Professional Ethics: The Consultant Professions and Their Code*, p. 153 (1959). Do we want consumers to choose their lawyers on the basis of how good a T.V. image they project? "Even the most ardent consumer advocate will admit that Madison Avenue has not always been a boon to the consumer, that too often flashy labelling or cute commercials obscure the question of quality." Barbara A. Stein, "Is Professional Advertising Unprofessional?" 12 Trial 26, 37 (June 1976).

Even if we do not have to face this specter of staged "candid" shots of the advertising attorney in between our

television programs, the quality of the advertising in terms of its packaging and appeal to consumer psychology will inevitably play a significant role in attracting consumers to particular lawyers and encouraging or discouraging them from consulting lawyers in general. "Susceptible as we are to advertising the public would then be encouraged to choose an attorney on the basis of which had the better, more attractive advertising program rather than on his reputation for professional ability." *Florida Bar v. Nichols*, 151 So.2d. 257, 268 (Florida 1963) (O'Connell, J. concurring in part and dissenting in part).

"To choose a consultant [i.e., attorney] on the basis of the skill of his advertising agency and the amount of his publicity spending, rather than on the advice of a disinterested, informed third party could scarcely profit the public." Bennion, *Professional Ethics: The Consultant Professions and Their Code*, p. 204 (1969). Thus, the nature of advertising and its focus on elements which will sell the product—here, the attorney—in its inherent emphasis on the profit-seeking motive of the attorney, and in its highlighting of factors that may be irrelevant to the choice of an attorney or to the seeking of legal services, leads to the inescapable conclusion that advertising by attorneys would not redound to the public interest. Even the simplest ad setting out the charge for the most definable legal service available, if there is one, will vary in its effect on consumers according to the size, the layout, and the position and medium through which it is disseminated. If attorneys advertise, consumers will view them as being primarily in the business of promoting their services for their own benefit, not as devoted to the public good as the legal profession demands that they be. Advertising consequently can only injure the public confidence and trust in attorneys that is essential if the public is to turn to attorneys when legal services are needed.



Still another purpose of the prohibition on advertising by attorneys is the need to prevent the stirring up of litigation by attorneys. See, e.g., *Jacksonville Bar Association v. Wilson*, 102 S.2d. 292 (Florida 1958); *In re Davidson*, 64 Nev. 514, 186 P.2d. 354 (1947); Note, "Goldfarb v. Virginia State Bar—Applying the Antitrust Laws to the Legal Profession," 19 Howard L. J. 149, 157 (Spring 1976); Note, "Advertising, Solicitation and Legal Ethics," 7 Vanderbilt L. Rev. 677, 684 (1954); Drinker, *Legal Ethics*, 212 (1953). Lawyers should not be in the business of encouraging and fomenting litigation. The role is to help people with legitimate grievances either to settle them peacefully or to achieve the best possible resolution of their grievances through whatever appropriate litigation or other means are available.

"A very important part of the advocate's duty is to moderate the passions of the parties, and, where the case is of a character to justify it, to encourage an amicable compromise of the controversy. It happens too often at the close of protracted litigation that it is discovered, when too late, that the play has not been worth the candle, and that it would have been better, calculating everything, for the successful party never to have embarked in it..." G. Sharswood, *An Essay on Professional Ethics*, 109 (5th Ed. 1907).

Solicited claims are more likely to be fraudulent than other claims, or at least less likely to be substantial and worthy of pursuit through the judicial system. Although this problem is less severe in advertising than in person-to-person solicitation, even a printed advertisement setting out the fees for a particular type of litigation can induce a consumer to bring a suit which he would not otherwise have instigated and which is not meritorious. Even critics of the ban against

advertising and solicitation recognize that this prohibition has contributed towards holding down the number of fraudulent and nuisance-value lawsuits. See, e.g., Note, "Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys," 62 Virginia L. Rev. 1135, 1162 (Oct. 1976); Note, "A Critical Analysis of Rules Against Solicitation by Lawyers," 25 Univ. of Chicago L. Rev. 674 (1958). Solicitation has been and continues to be against public policy because of its tendency to stir up litigation in situations in which there is no meritorious claim, the claim is fraudulent, or the parties would otherwise settle the claim peaceably through informal methods. *Jacksonville Bar Association v. Wilson*, 102 So.2d. 292 (Florida 1958); Henry S. Drinker, *Legal Ethics*, 212 (1953). Advertising would enhance the means by which a lawyer could intentionally or unintentionally stir up litigation and thus work against the public interest and the effective administration of the legal system.

Allowing attorneys to advertise would promote the interests of the least scrupulous while placing the more restrained and ethically inclined attorneys at a disadvantage. Of course, this argument is true to some extent of all advertising. However, attorneys provide specialized services which may mean the differences between life and death, liberty and imprisonment, possession of property or loss of property, or otherwise affect consumers in crucial ways. The consumer is less able to judge the efficacy of an attorney's services and the validity of his advertising claims than the relative merits of various color televisions and color television salesmen. He can see whether the television works or not. He does not know whether the attorney has successfully represented him. Even if the attorney wins a case for him, how does he know whether the case should have been susceptible of an advantageous settlement without litigation? How does he know that another attorney might



not have been able to win it more expeditiously and more economically? If the attorney loses the case, how does he know for sure whether the undesirable outcome is the result of the attorney's ineptness or dishonesty or whether it was unavoidable? How does he know whether or not he received bad advice from the attorney in the first place in the attorney's recommendation that he pursue the claim? All these and other problems involved in clients' evaluating attorneys' services make the advantages which advertising affords to the less scrupulous loom much more significant when contrasted to the idea of a "free enterprise" legal profession.

"Advertising by any professional man inevitably involves self-praise and puffing. If competitive advertising among lawyers were permitted, the conscientious, ethical practitioner would be inescapably at the mercy of the braggart." *In re Rothman*, 12 N.J. 528, 97 A.2d. 621 (1953). "The securing of business by solicitation and advertisement creates so great a desire to 'deliver the goods' according to representation, that the temptation to use ill means is greatly increased. This in itself justifies the prohibition against solicitation and advertising." Harrison Hewitt, "Review of Codes of Ethics by Edgar L. Heermance," 35 Yale L.J. 391, 392-93 (1926). Accord, *Jacksonville Bar Association v. Wilson*, 102 So.2d. 292 (Florida 1958). Not only is it a disservice to members of the profession for the unscrupulous to reap the advantages they may derive from improper advertising, but it is the consumers, especially the most vulnerable consumers, who are most hurt by the attractive and misleading inducements proffered by the unethical advertising attorney.

"If barristers were permitted to advertise, the advantages would go, not to the best qualified, but to the barrister with the longest purse and

the least scruples. If the choice of barristers came to be made by the general public on the strength of advertisement, the choice would tend to be more ill-informed and the public not so well served as at present." Bennion, *Professional Ethics: The Consultant Professions and Their Code*, 154 (1969), quoting the Bar Council.

"Further, Those attorneys with the greatest incentive to advertise might include those most willing to engage in deception. An attorney who cannot attract clients through reputation needs advertising. He might lack reputation for a number of reasons: because he is new in town; because his clients cannot easily gather reputation information; or because he is incompetent or untrustworthy. To the extent that advertising provides attorneys in the last category with a method of attracting business, it will divert clients to those members of the bar most likely to disregard professional duties." Note, "Sherman Act Scrutiny of Broad Restraints on Advertising and Solicitation by Attorneys," 62 Virginia L. Rev. 1135, 1160 (Oct. 1976).

This very interest in preventing temptation and the deflection of clientele to the least scrupulous practitioners has been recognized by the Supreme Court in regard to dentists.

"The community is concerned with the maintenance of professional standards which will assure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical

relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous."

*Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 612, 55 S.Ct. 570, 79 L.Ed. 1086 (1935).

It is the consumers who will benefit from the prohibition on advertising which prevents the unscrupulous and unethical attorney from attracting increasing amounts of business through the use of misleading and unfair advertising. An advertisement which may not look unfair or deceptive to the consumer, who lacks the specialized knowledge to evaluate it, may attract a client to the unscrupulous attorney. It is the client who suffers from the deception, dishonesty, or incompetence of the attorney who gains the client's patronage by such means. The difficulty of competing with the less scrupulous attorneys may make it impossible for ethically-minded attorneys to compete successfully with those who would use unfair or deceptive advertising methods. Consequently, attorneys who naturally incline towards more ethical practices may either be forced out of business or compelled to deviate at least somewhat from their high standards in order to survive professionally. It is no comfort to the consumer to know that there are laws which forbid deceptive or misleading advertising, if such advertising can even be defined and identified. The consumer who patronizes a television salesman because of his deceptive and unfair advertising is out the cost of his television set or the cost of repairing it. The consumer who retains an attorney on the basis of unfair or deceptive advertising may lose his liberty or his entire business or his home. He may not even know until long after the fact or

may never learn that the attorney was dishonest or incompetent—for example, it may not be until after his death that the defect in the will or trust that the deceptive or incompetent attorney drew up becomes evident. Obviously, it is too late to do anything about it then. Obviously, too, the importance to the client of a will which does not leave his property the way he intended to leave it or a title search which does not disclose a fatal defect in his title to his new home is much more important to the client than is the results of deception, fraud, or incompetence in the average commercial transaction. The services which the lawyer provides for the consumer are far too significant to permit an advantage to be gained by dishonest, unethical, and incompetent attorneys from misleading or deceptive advertising or from the deceptive and misleading elements inherent in advertising by attorneys.

Advertising by professionals, and especially by attorneys, is widely said to be inherently deceptive and misleading. In fact, some commentators go so far as to say that all advertising is inherently deceptive.

"The major part of informative advertising is, and always has been, a campaign of exaggeration, half truths, intended ambiguities, direct lies, and general deception. Amongst all the hundreds of thousands of persons engaged in the business, it may be said about most of them on the informative side of it that their chief function is to deceive buyers as to the real merits and demerits of the commodity being sold." Bennion, *Professional Ethics: The Consultant Professions and Their Code*, 214 (1969).

While one need not go so far as to condemn all advertising as necessarily misleading and deceptive,

advertising by attorneys certainly presents a special case for the argument that any advertising which might be allowed would be inherently deceiving and misleading, or that at the very least the impossibility of separating the misleading from the non-misleading and enforcing such restrictions necessitates the advertising prohibition. The informative aspects of any advertising by attorneys would be outweighed by the inherent dangers of misleading, confusing, and ultimately leaving the consumer worse off than if advertising remains prohibited.

"The ABA expresses a concern that legal-fee advertising will be very confusing and will cause much misrepresentation. The basis for this concern is that the legal profession is faced with the uncertainty of not knowing of all the particular acts that will be needed for a given service. The Lawyer's work product and legal fee will depend also on intangibles such as the ingenuity of the lawyer, the access to certain legal research and the lawyer's court experience. The State contends these services are so abstract any type of legal fee advertising would result in misrepresentation by the lawyer."

Note, "Advertising of Professional Fees: Does the Consumer Have a Right to Know?" 21 S.D. L. Rev. 310, 328 (Spring 1976), citing 22 UCLA L. Rev. 483, 508 (1974).

"The sale of legal services has all the characteristics of a market rife with opportunities for consumer deception. Consumers can normally deter false advertising either by refusing to buy after an initial inspection or by refusing to make a repeat purchase after an unsatisfactory experience with a product. In some markets, however, the

nature of the product robs consumers of both sanctions. The sale of infrequently purchased goods, such as funerals, encyclopedias, or swimming pools, the qualities of which cannot be tested in advance, invite false advertising because of little risk of consumer retaliation. Similarly, individual clients cannot inspect the quality of an attorney in advance, and they do not often repeat their purchases of legal services. The only economic check on consumer deception would be the danger that a defectively advertised product might acquire a bad reputation." Note, "Sherman Act Scrutiny of Bar Restraints on Advertising and solicitation by Attorneys," 62 Virginia L. Rev. 1135, 1160 (Oct. 1976).

Advertising by attorneys is inherently misleading or deceptive because consumers cannot evaluate the quality of legal services. The very nature of law as the providing of services requiring a specialized type of learning preventing the average consumer from knowing with any certainty whether any legal action is necessary, what legal action would be necessary, and whether it is adequately performed. If the consumer sees an advertisement that a simple trust will be established for X dollars, he may rush out to get a trust set up for his children. If the attorney who placed this advertisement simply drafts the trusts as the clients come in requesting them, how will the clients ever know whether they really needed a trust or whether some other testamentary or inter-vivos gift device might have better suited their needs? If the trust is faulty but never challenged, the consumer may never know that the trust would not have held up if anyone with standing had properly asserted its invalidity. The trust may in fact actually be successfully challenged, but the challenge may not come until after the client's death. If an attorney



advertises uncontested divorces for X dollars, how does the client know whether the attorney is simply obtaining for him an uncontested divorce because he requested it, or whether the attorney will properly explore, evaluate, and ascertain the needs of the client even if they prove not to be consistent with the client's initial request for a simple and uncontested divorce? If the attorney wins a lawsuit for the client, how can the client know whether the lawsuit was so simple that anyone could have won it, or whether the attorney did brilliant legal work which may have been necessitated because of the faulty legal work of a lawyer previously hired by the attorney? If the attorney loses a case for the client, how does the client know whether the loss is due to the incompetent representation by the attorney or simply because the case was not one in which the client could reasonably expect victory?

The critics of the advertising prohibition seek to provide answers for the objections to allowing attorneys to advertise. For example, it is said that one never knows the quality of anything to a certainty. One has to judge the lawyer or the color television by looks, reputation, and other factors which may seem relevant to the consumer. James G. Frierson, "Legal Advertising", 2 *Barrister* 6 (Winter 1975). However, one can tell whether or not a color television works. One can also make some sort of judgment about the clarity of the picture of a color television. One cannot simply look at a lawyer and decide on any appropriate basis that he is a good lawyer or a bad lawyer. Even after he has done work for the client, it is not often possible to be sure that he has done a good job or a bad job. Moreover, one is likely to have a better idea whether or not one wants a color television than whether or not one wants a testamentary trust set up for his children.

At least one should be able to find out the price of legal services, it is argued. See, e.g., Monroe H. Freedman, "Advertising and Solicitation by Lawyers: A Proposed Redraft of Canon 2 of the Code of Professional Responsibility," 4 *Hofstra L. Rev.* 183 (Winter 1976); James G. Frierson, "Legal Advertising", 2 *Barrister* 6 (Winter 1975); Allen V. Morrison, "Institute on Advertising within the Legal Profession-Pro", 29 *Okla. L. Rev.* 608, 617-18 (Summer 1976); Note, "Goldfarb v. Virginia State Bar—Applying the Anti-Trust Laws to the Legal Profession", 19 *Howard L. J.* 149, 157 (Spring 1976). It is frequently said that certain types of legal services are more or less standardized so that their prices can be advertised in a meaningful way. For example, the simple uncontested divorce without any questions of property settlement or child custody is often cited as a type of service which lends itself to price advertising. However, here we once again run into the problem that the consumer may not know whether what he needs is really the "simple uncontested divorce." If he selects an attorney on the basis of the price advertised for the "simple uncontested divorce," and it turns out that what he needs is a more complicated action, he may have been misled drastically by the advertisement of prices for this supposedly standardized service. On the other hand, he may insist on getting the simple uncontested divorce that he asked for and may well regret it later on. Either way, the consumer has not been helped by the advertising of prices for this service.

Even the so-called "simple uncontested divorce" may not mean the same thing to one lawyer as it does to another. If the client has previously been to another attorney and negotiated a settlement or proposed settlement agreement, will the divorce remain the same "simple uncontested divorce" to the new attorney who was asked to obtain the divorce on the assumption that this agreement

will be incorporated into it? If so, is the attorney taking the responsibility that he should assume for examining this proposed agreement and determining its desirability and validity before obtaining the client's divorce with the agreement incorporated into it? If the other spouse is not available and has to be tracked down, will the client consider this still a simple uncontested divorce, or will he understand if the attorney charges extra for additional work created by the unavailability or difficulty in finding the other spouse? If additional significant legal complications arise, will the fees that the attorney charges for those additional matters be sufficiently higher than other attorneys that the client feels he has been deceived or cheated?

Suppose an attorney advertises a "simple will" for a set fee. It seems likely that a significant percentage of people who come to the attorney to have a "simple will" drawn up for that set fee will actually need a more complicated will or some other type of testamentary device instead of or to supplement the will. Let us hope that the attorney will not be considered guilty of "bait and switch" tactics for advising the client that what he really needs is not the "simple will", but a very different type of legal instrument or instruments. Obviously, the average layman does not know what his needs are before he walks into an attorney's office. He is likely to feel cheated and be misled by advertising of a particular legal service performed for a set price when it turns out that the attorney recommends to him some other, perhaps much more expensive legal service.

The "simple will" illustration demonstrates the impossibility of having effective and truly informative advertising of legal fees. What is involved in a "simple will"? Surely each attorney will have a different idea as to what constitutes a "simple will", and even a single attorney would have difficulty in defining it and drawing a precise

line. The alternative suggested for problems of this type is to advertise an hourly rate, with perhaps a range of hours which might be involved or an average number of hours and an hourly rate might be used. See, e.g., James G. Frierson, "Legal Advertising", 2 Barrister 6 (Winter 1975). But even the simplest transactions can vary very substantially in the amount of time required. If an attorney advertises an hourly rate of \$30.00 and an average of two (2) to ten (10) hours for a particular transaction, the consumer who might feel that he can afford \$60.00 may find \$150.00 prohibitive. How does he know whether he can afford the service or whether the service is worth that much to him until after it has been performed or at least until the attorney has charged him for a half-hour to one hour consultation?

Yet another problem with the hourly rate is that the client cannot know how efficiently the attorney will perform the service. Without even considering the question of the quality of the work done, how does the client know whether the attorney is generally a fast worker or a slow worker? How does he know how much difference it will make if the attorney is a young one without a great deal of experience? How does he know whether even the experienced attorney may not run into some particular aspect which is unfamiliar to him and which may greatly increase the time necessary for providing the service? All these objections do not mean that price advertising could never be of any use to any consumer. But they do point out significant problems with the idea that price advertising will permit the consumer to make an intelligent choice on the basis of the cost of the service to be provided. The value of price advertising is obviously less in relationship to legal services than it is for most products. When viewed in the light of serious problems connected with the lifting of any advertising prohibition, the decreased informative value to the consumer because of the nature of the legal



profession and legal services is an important factor for consideration.

"I doubt that we know enough about evaluating the quality of medical and legal services to know which claims of superiority are 'misleading' and which are justifiable. Nor am I sure that even advertising the price of certain professional services is not inherently misleading, since what the professional must do will vary greatly in individual cases." *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council*, \_\_\_\_ U.S. \_\_\_\_, 96 S.Ct. 1817, 1832, 48 L. Ed. 2d. 346 (1976) (Burger, J. concurring).

Thus, we have the conclusion that the advertising of legal services is inherently misleading and deceptive or so susceptible of being misleading and deceptive that it should not be permitted. Critics of the advertising prohibition do not agree with this assertion, but at least a vast majority of the critics assume that advertising by lawyers, doctors, and other similar professional groups requires strict regulation and must be viewed differently from advertising of products by the ordinary commercial businessmen. Unfortunately, this is more easily said than done. While the Bar can easily and readily enforce an absolute ban on advertising, it is much more difficult if not impossible for it to enforce a ban on misleading or deceptive advertising.

"Since laymen often may not know they have been deceived, the bar could not rely on consumer complaints to alert authorities to deceptive practices. Moreover, consumer ignorance would increase the number of claims that could seem deceptive. Many true claims might be misleading. For example, the assertion 'my wills have been

upheld by the Supreme Court three times' implies competence but in fact may reflect incompetence: if the wills had been clearly drafted, they might never have been contested. In addition, bar regulation of advertising could encourage consumers to believe the advertisements that are published. As a result, the advantages of using deceptive advertising might actually increase." Note, "Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys," 62 Va. L. Rev. 1135, 1172 (October 1976).

Regulation of fraudulent, deceptive, and misleading advertising could only help consumers after the fact. After they are injured, they might hope to recover some of their loss if any could be proved or to have the satisfaction of having the attorney disciplined in some way. Statement of R. William Ide, III, Chairman, Young Lawyers Section of the ABA to the ABA Standing Committee on Ethics and Professional Responsibility (October 31, 1975). Suits by individual consumers would not be of significant value in enforcing restrictions on misleading and deceptive advertising in the overview. First, the claim must be large enough to warrant the consumer's bringing a suit. Second, the consumer would have to prove the misleading or deceptive advertising by the attorney. Third, presumably some requirement would remain to establish causation and actual loss. All these factors would prevent consumer suits and recoveries from serving as a significant check and sanction on misleading and deceptive advertising by attorneys. Obviously, some other enforcement mechanism is needed.

"Of course, the determination of what is or is not untrue or deceptive will often be difficult. Bar ethic committees and state courts will frequently



have to decide when vagueness, ambiguity, exaggeration, or failure to disclose constitutes deception. In determining whether an advertisement is untrue, data, statistics, and expert testimony will often be in conflict. Fortunately, a body of law exists which should prove a useful guide in developing standards for legal advertising. Since 1914 the Federal Trade Commission has asserted jurisdiction over, and has ruled on, an extraordinarily wide range of deceptive advertising cases. The FTC opinions cannot be rotely applied, however, because legal advertising presents a special case and in these two ways. One of the FTC's most important insights is that what constitutes deception depends upon the area being regulated. This is particularly significant regarding legal advertising. Mis-statements which are overlooked or deemed unimportant in other advertising may be inappropriate in legal advertisements because the public lacks sophistication concerning legal services and may therefore be more easily deceived." Note, "Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available," 81 Yale L. J. 1181 (1972).

Thus, even those who advocate that only misleading and deceptive advertising be forbidden recognize the difficulty of determining what is deceptive in the context of lawyer advertising. Also, there is no doubt that advertising by attorneys must be subjected to different standards from advertising by the ordinary commercial entrepreneur. Consider the size of such agencies as the Federal Trade Commission and the Federal Commerce Commission. Then consider how closely lawyer advertising would have to be watched in order to catch individual violations of

restrictions against deceptive and misleading advertising, not simply practices common in the profession or advertising which constituted a particular glaring violation of the restrictions because of the nature and size of the advertiser or because of the nature of the advertising itself. It is clear that the Federal Trade Commission itself could not regulate lawyer advertising, both because it could not reach any advertising by attorneys which was not deemed to be subject to the interstate commerce power and because it simply does not have the resources to monitor the 236,000 lawyers in active practice at present, including some 37% in solo practice. Note, "Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys." 62 Va. L. Rev. 1135, 1170 (October 1976); ABA, The 1971 Lawyers Statistical Report 10 (1973). The obvious alternative is for the State Bars to shoulder the burden of regulating advertising by attorneys. See, e.g., Statement of R. William Ide, III, Chairman, Young Lawyer's Section of the ABA, to ABA Standing Committee on Ethics and Professional Responsibility (Oct. 31, 1975). But as J. Rex. Farrior, Jr., President of the Florida Bar Association, wrote in the March issue of the Florida Bar Journal:

"Advertising will lead to abuses which will be impossible to police. Not only would advertising of professional services lend itself to misleading statements far more readily than most of the advertising which currently demands constant investigation, but proper regulation of advertising in such a subjective area would be an impossible task, *requiring manpower and resources totally unavailable under our present dues structure.*" Quoted in Barbara A. Stein, "Is Professional Advertising Unprofessional?" 12 Trial 26, 36 (June 1976) (Emphasis Added).

It should require no lengthy discussion of authorities in support of the proposition that State Bars are not currently equipped, either in number, nature, or finances, to police attorney advertising as would be required if restrictions simply prohibited misleading and deceptive advertising.

Thus, to allow attorneys to advertise as long as their messages were neither misleading or deceptive would create an almost insuperable dilemma. As even critics of the advertising prohibition have recognized, advertising by attorneys would have to be carefully scrutinized and subjected to different and properly much more rigorous standards than ordinary commercial advertising. Yet the resources are not now available to police attorney advertising in this manner, and the cost of establishing the manpower and services necessary for such policing functions is prohibitive. The likely result would be that lawyers would be able to advertise with only a rather cursory watch being kept on the nature and quality of their advertising and only random violators being subjected to sanction. In view of the strong arguments that advertising by attorneys is inherently deceptive and misleading, or at the very least that it is virtually impossible to distinguish the deceptive and misleading from the non-deceptive and non-misleading, the idea of allowing attorneys to advertise as long as they steer clear of deceptive and misleading messages is totally unacceptable.

What effect would lifting the ban on advertising have on the competitive relationships among lawyers and the ability of new practitioners to enter the field successfully? It has been argued that the ban on advertising makes it difficult for new lawyers to build up a practice and operate as a barrier to entry into the profession. But it is not at all clear that permitting advertising would allow new lawyers to use advertisements to build up a practice more easily and more quickly.

"A barrier might persist even after the bans were lifted. The number of cases in which a new attorney is as competent as an established lawyer probably is very small. New attorneys may lack the collective good will of the local courts and bar, a vital asset in rendering some legal services. Further, young attorneys are unschooled in the practical assets of the practice. To the extent that consumers will possess and rely on accurate information about the market, lifting the advertising ban might do little to help new attorneys establish themselves in the market. In addition, even if the rules were abolished, economies of scale and marketing could work as an equally pernicious barrier to entry against any except the largest new firms. As a result, the barrier effect alone should not make the restrictions on lawyer advertising and solicitation unreasonable." Note, "Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys," 62 Va. L. Rev. 1135, 1165 (October 1976).

Professor Lees and other complain that the rules against touting, advertising and undercutting operate in favour of firms already established and prevent newcomers using what are the 'normal competitive devices of new entrance.' This argument cuts both ways, since if newcomers enter a field where costs are inflated by the need to indulge in large-scale advertising they will need more initial capital or bridging finance to cover the period before fees begin to flow in. Harris and Seldon point out that in a number of industries 'advertising has been used with the intention of

stopping or discouraging new competitors.' The American economist, Gideonse, alleged that advertising entrenched monopoly by setting up a financial barrier to the competition of new and small firms." Bennion, *Professional Ethics: The Consultant Professions and Their Code* p. 211 (1969)

The concept that the cost of advertising may represent a barrier to entry into a new field has been recognized as a factor to consider in evaluating the reasonableness of particular commercial activities in the anti-trust field. See e.g., *Sulmeyer v. Coca Cola Company*, 515 F.2d. 835 (5th Cir. 1975), cert. den. 424 U.S. 934 (1976). The fear that the need for and cost of advertising could present a serious obstacle to the young lawyer has been shared by prominent members of the profession. For example, Massachusetts Academy of Trial Lawyers' President, James G. Reardon, had commented that advertising "would be most unfair to those least able to afford it—the young practitioner just launching his career who has no allowance in his budget for an expensive campaign." Stein, "Is Professional Advertising Unprofessional?" 12 Trial 26, 37 (June 1976).

We would have to shut our eyes to reality to ignore the fact that advertising costs money. In contrast to many other professions such as medicine and dentistry, law requires a relatively small amount of capital in order to enter the field. If other attorneys are advertising, the lawyer just entering the field would most need advertising in order to bring his name before the public which would already be familiar with the names of other practitioners who had the advantage of both their advertising campaigns and the fact that they had been in practice long enough to establish a reputation in the community. The need for advertising would require that the young lawyer begin with a good deal more capital and might deter or make it difficult, if not

impossible, for some young lawyers without that capital to build up a practice.

j The cost of advertising would not only represent a barrier to entry in the field, but it would necessarily increase the cost of legal services. Even if advertising brings in more clients and more business to the attorney, the cost of providing services is likely to increase.

"The purely economic argument runs as follows. Professional services differ from manufactured goods in that they are rendered individually and thus are not susceptible to the economies of standardization and mass production. The argument that advertising increases demand and enables economies of large-scale production to be achieved therefore does not apply." Bennion, *Professional Ethics: The Consultant Professions and Their Code*, p. 153 (1969).

There is a significant limit on the extent to which advertising can increase the demand for services of attorneys. Advertising of a good product which is reasonably within the financial reach of most consumers can generate a very large demand for the product. Advertising of uncontested divorces, for example, cannot create the same demand for the legal service of obtaining a divorce for the simple reason that there are only a finite number of persons who need a divorce, and presumably most of these people will obtain a divorce even without advertising. It is also questionable whether advertising of attorneys' services would benefit the public if it did indeed create a demand for their services which did not exist before. Giving someone the idea of getting a divorce simply because the cost is not prohibitive and it seems an easy way to get out of marital difficulties is not a desirable role for the legal profession.



Thus, advertising by attorneys cannot and should not increase demand for services in the same way that advertising of a product may. Moreover, unless the attorney has a very small practice before advertising, he will not significantly decrease his cost for a particular service by obtaining more clients. If he is already obtaining as much business as he can handle and advertises simply to maintain his competitive position, the advertising costs will simply be added on to the cost of legal services. If he significantly increases his business so that he cannot handle it all himself, then he will need to associate himself with another attorney and thus absorb all or most of the increased profit he would otherwise have obtained. "Surveys of businessmen and economists show no consensus on the general question whether the price for a product is higher or lower as a result of advertising." Note, "Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys," 52 Va. L. Rev. 1135, 1166 (October 1976). If this is true even in the ordinary commercial field, how much more true will it be for advertising of legal services?

Even if attorneys are simply advertising prices and not urging people to come get their divorce today, the same arguments apply. In fact, to the extent that price advertising is simply informative and not intended to generate increased business, it is even more likely that advertising will simply increase the cost of the service to the consumer. If price advertising makes attorneys more competitive price-wise, as some advocates of advertising argue, the pressure on attorneys to reduce prices of at least some services may be intolerable. Do we really want to see price wars among attorneys? Do we want attorneys to price some services at a loss and make up the loss in supplying other services? Practices which may be permissible in relationship to the advertising and sale of products are not necessarily desirable when it comes to the advertising and delivery of legal

services. If the pressure of advertising causes attorneys to reduce prices unduly, then either the attorneys are operating at a loss and will eventually be driven out of the practice of law or they will necessarily reduce the quality of services. See, e.g., Statement of R. William Ide, III, Chairman, Young Lawyers Section of the ABA to ABA Standing Committee on Ethics and Professional Responsibility (October 31, 1975); Stein, "Is Professional Advertising Unprofessional?" 12 Trial 26, 37 (June 1976).

"If costs then increase, and charges (and therefore income) are reduced, can we really believe, with Professor Lees, that there would be no tendency for quality of service to decline? The Prices and Incomes Board said in one report that 'quality in professional work depends on professional standards', and in another that standards depend primarily on the rigour of the tests applied to the granting and taking away of qualifications. If they are insufficiently remunerated, professional people will either be forced out of private practice or will lower their standards to enable costs to meet income. No other conclusion is possible." Bennion, *Professional Ethics: The Consultant Professions and Their Code*, 210-11 (1969).

Advertising by attorneys, even if it is simply pure price advertising, presents serious questions about its effect on the cost and quality of legal services and the difficulty of new attorneys in building up a practice. We cannot simply dismiss these concerns out of hand. These concerns, and all the other problems associated with advertising by attorneys, make it clear that if advertising were permitted, it would require complicated and extensive restrictions and an expensive and time-consuming mechanism of enforcement. It is doubtful that we could successfully define the types of

advertising that should be permitted with sufficient specificity to enable lawyers to know whether their advertisements are appropriate or inappropriate. It is also doubtful that we could successfully identify which advertisements placed by attorneys were improper and which were permissible. Even if we could do all of these things, it is extremely doubtful that we would be able to enforce all the necessary restrictions in a way that would adequately police the profession's advertising and adequately protect and compensate the consumer who may be harmed by improper advertising. Even if one does not accept the proposition that advertising by attorneys is inherently undesirable and is at least as harmful to the consumer as it is beneficial, one must recognize that devising a means of permitting restricted advertising with the necessary safeguards is impossible. The only way successfully to prevent deceptive and misleading advertising and harm to the public and the profession which would result from improper advertising is to prohibit advertising by attorneys.

### C. ADVERTISING RESTRICTIONS ON ATTORNEYS DO NOT VIOLATE THE FIRST AMENDMENT?

There is now no longer any doubt that advertising is within the scope of the protection of the First Amendment to the United States Constitution. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, \_\_\_ U.S. \_\_\_, 96 S.Ct. 1817, 48 L. Ed2d. 346 (1976). Accord, *Young v. American Mini Theatres, Inc.*, \_\_\_ U.S. \_\_\_, 96 S.Ct. 2440, 49 L. Ed.2d 310 (1976). The recent unambiguous determination that commercial speech or advertising is protected by the First and Fourteenth Amendments merely affirms the implication of a significant line of earlier cases by this Court. E.g., *Bigelow v. Virginia*

421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed. 2d 600 (1975); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed. 2d. 669 (1973); *Rowan v. United States Post Office*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed. 2d. 736 (1970); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d. 686 (1964). This lays to rest the inference drawn from some cases that commercial speech or advertising was not protected by the First Amendment. See, e.g., *Breard v. City of Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951); *Valentine v. Chrestenson*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1278 (1942).

The determination whether advertising prohibitions on attorneys violate the First Amendment does not simply stop with the conclusion that advertising or commercial speech is within the scope of First Amendment protection. As noted by this Court, "We have recently held that the First Amendment affords *some* protection to commercial speech. We have also made it clear, however, that the content of a particular advertisement may determine the extent of its protection." *Young v. American Mini Theatres, Inc.*, \_\_\_ U.S. \_\_\_, 96 S.Ct. 2440, 49 L.Ed. 2d 310 (1976).

"Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. . . . To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged." *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed. 2d. 600 (1975) (citations omitted).

Whether speech is commercial or non-commercial, it is necessary to balance the First Amendment interest against the strength of the public interest asserted. E.g., *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 2235, 44 L.Ed. 2d 600 (1975); *Rowan v. United States Post Office*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed. 2d. 736 (1970); *Martin v. City of Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943).

In weighing or balancing the interest of the State in regulating attorneys and protecting the public asserted to support the proscription on advertising against the consumer's "right to know", we must recognize that commercial speech, and particularly advertising by professionals such as lawyers, involves special problems which require a different approach.

"As Mr. Justice Stuart pointed out in *Virginia Pharmacy Board v. Virginia Consumer Council*, the 'difference between commercial price and product advertising...and ideological communication' permits regulation of the former that the First Amendment would not tolerate with respect to the latter." *Young v. American Mini Theatres, Inc.*, \_\_\_\_ U.S. \_\_\_\_, 96 S.Ct. 2440, 2451, 49 L.Ed. 2d 310 (1976).

"In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are common sense differences between speech that does 'no more than propose a commercial transaction' *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S., at 385, 93 S.Ct. at 2558, 37 L.Ed. 2d, at 676-677, and other varieties. Even if the

differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, \_\_\_\_ U.S. \_\_\_\_, 96 S.Ct. 1817, 1830, 48 L.Ed. 2d. 346 (1976).

If commercial speech generally is evaluated differently for the First Amendment purposes from speech which is purely intended to communicate ideas, advertising by professionals is an especially strong area for permitting State regulation and even prohibition. The authority and necessity for State to regulate professionals, and especially attorneys, cannot be doubted. (See earlier discussion in this Brief.) Even in the recent First Amendment cases, the Court has recognized this special need for the State to regulate professions. "The State, of course, has a legitimate interest in maintaining the quality of medical care provided within its borders." *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 2235, 44 L.Ed. 2d. 600 (1975).

"We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain



kinds of advertising." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, \_\_\_\_ U.S. \_\_\_\_, 96 S.Ct. 1817, 1831, n. 25, 48 L.Ed. 2d. 346 (1976).

The question then becomes one of weighing the State's admitted interest in regulating the professions, and especially the legal profession, against the First Amendment interest asserted by consumers who wish to receive the information that lawyers might communicate in advertisements. Earlier portions of this Brief have set out and discussed many, although certainly not all, of the myriad reasons supporting the general prohibition on lawyer advertising. But *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, *supra*, might be argued to have determined this question already. As noted by this Court itself in a footnote to that opinion, however, lawyer advertising is in many respect different from the advertising of prescription drug prices by pharmacists. In purchasing drugs from a pharmacist, the consumer is not simply reading advertisements and deciding what drug he will purchase at what price. The consumer must first have a prescription from a doctor who will determine whether any medication is advisable and, if so, exactly what medication. The advertisement does not have any significant function of attracting the consumer to the idea of buying medication in the first place or of determining which medication the consumer will purchase. Both those questions are for his physician. In contrast, there is no insulation between the attorney who advertises the price of a particular legal service and the client whom might request that service. The same attorney determines whether any legal activity is necessary, what legal activity is necessary, and the prices he will charge for his legal services. Only in a small range of situations can a consumer say I need a particular legal service and then proceed to acquire that legal service. Even if he thinks he

knows what legal services he required, it may turn out that he really does not require any legal service or that what he needs is something very different. The consumer may be misled by an advertisement quoting prices for a legal service which he believes he needs, when it turns out what he really needed is something else which another attorney could have provided at a lower fee. The consumer may tend to insist upon the particular legal service which he felt he needed and to which he was attracted by the lawyer's advertisement. Attorneys may be tempted simply to go ahead and provide for the client the service requested by the client on the basis of the attorney's advertisement rather than thoroughly exploring the problem and urging the consumer to accept or obtain some other service which might be more appropriate.

The advertising of prescription drug prices can also be distinguished from the advertising of prices for attorney's legal services in the nature of the services which they provide. Prescription drugs are largely prepackaged. In the vast majority of the cases, the pharmacist simply pours drugs prepared by the manufacturer from one bottle into another. The customer, who already has a prescription from a physician, knows that one hundred tablets of 5 milligrams of Valium purchased from one pharmacist will be identical in quality and quantity to one hundred tablets of 5 milligrams of Valium purchased from any other pharmacist, at least in the vast majority of cases. In contrast, legal services cannot be so easily defined. Since the consumer does not usually know what services he needs, he does not know what prices to compare. If he looks at an hourly rate, he does not know how long it will take one attorney to perform a task in relationship to the time that another attorney might require. He does not know the kind of attention to the problem and the types of devices that one attorney might use for the same problem in comparison to

the attention and means of resolving the client's problem that another attorney might use. There are certainly some services which are closer to being standardized than others, such as the typical uncontested or consent divorce without complication of property settlements and custody disputes which is so often cited. Even there, there will be some differences between what one attorney will include in his price and what another attorney will include in his advertised fee for supposedly the same service. And here too the consumer does not know for sure that the simple uncontested or consent divorce is what he really needs. Or he cannot be sure that complications will not arise which will require further work on the part of the attorney, which may or may not be at a price comparable to the prices that other attorneys would charge for those additional services. The problems involved in permitting price advertising of even the simple consent or uncontested divorce are evident. Few things are as close to being standardized as the simple uncontested or consent divorce. No meaningful price advertising by attorney is possible.

Since price advertising by attorneys is not meaningful in the way that price advertising by pharmacists may be, the arguments against price advertising can more easily overcome the asserted First Amendment interest. Moreover, the arguments against price advertising or any advertising by attorneys are much more numerous and much stronger than the reasons advanced against advertising by pharmacists. For the reasons stated here and in the section of this Brief on policy, we believe that any balancing of the First Amendment interest against the interest of the State in prohibiting advertising for protection of the public and maintaining the effectiveness of the legal system outweigh the First Amendment interest in advertising by attorneys.

#### D. ADVERTISING RESTRICTIONS ON LAWYERS DO NOT VIOLATE THE SHERMAN ANTITRUST ACT.

Advertising restrictions on lawyers, as adopted by the vast majority of the jurisdictions in the United States, do not violate the Sherman Antitrust Act. The advertising restrictions of the American Bar Association's Code of Professional Responsibility, or some modified version of them, have been adopted in all fifty states and in the District of Columbia. Note, "The Sherman Act and the American Bar Association's Ban on Advertising; Madison Avenue Will have to Wait," 10 Suffolk L. Rev. 557, 561, n. 24 (Spring 1976). In the vast majority of these jurisdictions, the advertising restrictions are specifically expressed or mandated by statute. In most of the others, the restrictions are mandatory rules adopted by the State Supreme Court pursuant to its authority to regulate the legal profession, an authority which is inherent in the nature of the judicial system and legal professions and which is generally recognized by statute. In at least 33 states, statutes provide that advertising or, more generally, solicitation constitutes criminal activity. In four other states, including Arizona, state law provides that solicitation is grounds for disciplinary action against an attorney. In four more states, the State Supreme Court has promulgated rules banning solicitation even in the absence of statutory proscription of advertising or solicitation. In only nine jurisdictions are there neither statutes nor court rules specifically barring solicitation by attorneys. Note, "Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys", 62 Va. L.Rev. 1135, 1142-43 n. 49 (October 1976). Thus, in 42 of the 51 jurisdictions, either statutory proscriptions or rules adopted by the State Supreme court, or both, specifically prohibit or restrict advertising and solicitation by attorneys.



Faced with this kind of state law authority for the great majority of state advertising restrictions on lawyers, we must examine these restrictions in light of the "State action" exception to the Sherman Act's Application. In *Parker v. Brown*, this Court held that a marketing program intended to restrict competition among California raisin growers and to maintain prices in the sale of raisins by the growers did not violate the Sherman Act since it was expressly authorized by a state law and implemented by a state commission created by the same Act. 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The Court noted that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. 341, 350-351, 63 S.Ct. 308, 313, 87 L.Ed. 315 (1943).

The more recent case of *Goldfarb v. Virginia State Bar*, established that lawyers, or members of any profession, are not automatically exempt from the Sherman Act. 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed. 2d. 572 (1975). *Goldfarb* expressly held that the State Bar of Virginia and the County Bar of Fairfax County had violated the Sherman Act in that the County Bar had promulgated minimum fee schedules and that the State Bar had issued opinions indicating that it clearly expected minimum fee schedules to be observed strictly if disciplinary action were to be avoided. However, in *Goldfarb* the Supreme Court of Virginia had not adopted rules establishing or requiring adherence to minimum fee schedules. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed. 2d. 572 (1975). Additionally, the Court there noted that, although the State Bar may be a State agency for some purposes, it was essentially participating in a basically private anti-competitive activity when it required adherence to minimum fee schedules. Of course, the County Bar was clearly not acting as a sovereign

authority of the State in promulgating its minimum fee schedules.

"The threshold inquiry in determining if an anti-competitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790, 95 S.Ct. 2004, 2015, 44 L.Ed. 2d. 572 (1975).

The State action exemption applies when the activity is "compelled by direction of the State acting as a sovereign." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790, 95 S.Ct. 2004, 2015, 44 L.Ed. 2d 572 (1975) (emphasis added).

Advertising restrictions regulating the conduct of attorneys are in the vast majority of jurisdictions clearly within the "State action" exemption from the Sherman Antitrust Act. Since they are generally embodied in State statutes or Supreme Court rules or both, they are unquestionably compelled by the State in its capacity as sovereign, not simply actions of a regulatory agency without the necessary legislative direction. As previously mentioned, for example, North Carolina General Statute § 84-38 makes it illegal to solicit legal business. Additionally, North Carolina General Statute § 84-21 authorizes the Supreme Court of North Carolina to accept rules submitted to it by the State Bar and, by entering those rules upon its minutes, give them the force and effect of law. In North Carolina General Statute § 84-28, grounds for discipline of a member of the North Carolina State Bar are listed and include the violation of the Code of Responsibility adopted and promulgated by the State Bar. Similarly, Arizona Revised Statutes Annotated, § 32-257(7) provide that solicitation is a ground for discipline, and the disciplinary rules of the



State Supreme Court forbid a lawyer to publicize himself, his partner, associate, or any other lawyer affiliated with him or his firm as a lawyer. As indicated above, North Carolina and Arizona's regulatory schemes are typical of the vast majority of jurisdictions in the United States. Consequently, advertising restrictions in almost all jurisdictions are clearly within the most narrowly-limited definition of the "State action" exemption. (The more recent case of *Cantor v. Detroit Edison Company*, 96 S.Ct. 3110 (1976), does not in any way cast doubt upon this statement. That case dealt with private action and the extent to which it was authorized or required by action of the State in its sovereign capacity. Here we are dealing clearly with a challenge to the action of the State in its sovereign capacity and to the actions of State officials in carrying out the sovereign command.)

Even if the "State action" exemption were not applicable, advertising restrictions on lawyers still would not violate the Sherman Act.

"We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' *United States v. Oregon State Medical Society*, 343 U.S. 326, 326, 72 S.Ct. 690, 697, 96 L.Ed. 978 (1952), see also *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 611-613, 55 S.Ct. 570, 571-572, 79 L.Ed. 1086

(1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' See *Sperry v. Florida*, 373 U.S. 379, 383, 83 S.Ct. 1322, 1325, 10 L.Ed. 2d. 428 (1963); *Cohen v. Hurley*, 366 U.S. 117, 123-124, 81 S.Ct. 954, 958, 6 L.Ed. 2d. 156 (1962); *Law Students Research Council v. Wadmand*, 401 U.S. 154, 157, 91 S.Ct. 720, 723, 27 L.Ed. 2d. 749 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed. 2d. 572 (1975).

"The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 778 n. 17, 95 S.Ct. 2004, 44 L.Ed. 2d. 572 (1975).

As indicated by the court in *Goldfarb*, mechanical application of traditional antitrust rules to State regulation

of professional activity is inappropriate. The purposes of State law regulation of the legal profession include the promotion of the administration of justice and protection of consumers. These aims of State regulation of legal activities, plus the novelty of applying Sherman Antitrust concepts to the professions, require careful analysis of the purpose of the Sherman Act and the purposes, policies, and effects of the State law regulation in order to apply the Sherman Act to the restrictions against advertising or solicitation by attorneys. Either a "rule of reason" approach or a new method of analysis is necessary to evaluate restrictions on lawyers' advertising in relationship to the Sherman Act, should the "State action" exemption not be considered to immunize the restrictions from the Sherman Act. Discussion of the purposes and effects of the advertising restriction for purposes of evaluation under the Sherman Act would inevitably overlap and duplicate the discussion of the purposes and effects of advertising restrictions in relationship to the First Amendment claim. Consequently, I have not tried to separate them and will not discuss the merits of the advertising restrictions here. However, I believe the argument as to the effects of advertising restrictions and the policies they promote will inevitably support the conclusion that, whether analyzed under the traditional "rule of reason" approach or under some other scheme adopted for purposes of this novel application of the Sherman Act to professions, advertising restrictions on attorneys do not violate antitrust laws reviewed in the context of the special role of attorneys in the system of justice, the services attorneys provide, the principles and organization by which attorneys are regulated, and the purposes and policies sought to be achieved through advertising restrictions.

## CONCLUSION

For the reasons set forth herein, State prohibitions against advertising by attorneys should be upheld.

Respectfully submitted, this 17th day of December, 1976.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY THAT I have this day served a copy of the attached Brief of the State Bar of North Carolina as Amicus Curiae in Support of the State Bar of Arizona upon the following:

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Respectfully submitted.

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FOR ARGUMENT

No. 76-316

Supreme Court, U. S.  
FILED

DEC 18 1976

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1976

JOHN R. BATES and VAN O'STEEN,

*Appellants,*

vs.

STATE BAR OF ARIZONA,

*Appellee.*

On Appeal from the Supreme Court of Arizona

**BRIEF AMICUS CURIAE OF THE  
AMERICAN DENTAL ASSOCIATION**

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**In the  
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OCTOBER TERM, 1976

**No. 76-316**

JOHN R. BATES and VAN O'STEEN,

*Appellants,*

vs.

STATE BAR OF ARIZONA,

*Appellee.*

On Appeal from the Supreme Court of Arizona

**BRIEF AMICUS CURIAE OF THE  
AMERICAN DENTAL ASSOCIATION**

**Statement Of Interest Of The American Dental Association**

This Brief is being filed by consent of the parties to this appeal.\*

The American Dental Association, an Illinois not-for-profit corporation, is a voluntary dental association with approximately 109,664 fully privileged members, all of whom are dentists licensed to practice in the various states of these United States, the District of Columbia, the Commonwealth of Puerto Rico or a dependency of the United

\*Appendix (hereinafter App.) 1-2 contains the stipulations.



States. The object of the American Dental Association as set out in its Constitution is:

"The object of this Association shall be to encourage the improvement of the health of the public, to promote the art and science of dentistry and to represent the interests of the members of the dental profession and the public which it serves." (Constitution of the American Dental Association, Article II)

Probable jurisdiction was noted upon a Jurisdictional Statement delineating two issues on the record before this Court: does a ban on lawyer advertising violate the First Amendment, and, secondly, does the ban violate the Sherman Act. A determination of these issues may have a profound effect not only on the activities of the American Dental Association, as a nationwide professional association, but also on the activities of its dentist members and on each state and local dental society which comprise the Association's constituent and component societies. This is true because most state legislatures\* have enacted rather specific prohibitions of various forms of advertising and the American Dental Association and the local and state dental associations through the country have Principles of Ethics which regulate advertising by dentists.

As a result of the foregoing, it is respectfully suggested that this Court should take cognizance of the public policy considerations of a non-lawyer association which is vitally concerned with the maintenance of high professional health standards.

The American Dental Association respectfully submits this Brief Amicus Curiae in support of affirmance of the decision of the Arizona Supreme Court.

\* App. 3-6 is a narrative description of the states which have specific statutory prohibitions of advertising. The statutory citations are found at 7-9.

## ARGUMENT

### I.

#### ADVERTISING RESTRICTIONS ON PROFESSIONALS SERVE A VALID PUBLIC INTEREST.

This Court has evolved two standards of review for First Amendment cases (a) the "as applied" standard and (b) the facial "overbreadth" doctrine. Both standards employ a balancing of interests. The facial "overbreadth" doctrine balances the interests of both those before and not before the court. The "as applied" standard concerns itself solely with the parties before the court.

The facial overbreadth doctrine was most recently defined as follows in *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15 (1973):

"Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression. . . . The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. *Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort.* Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. . . . Additionally,

overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner." [Emphasis supplied; citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), among others.]

The balancing test utilized in overbreadth and "as applied" cases is best described by *United States v. O'Brien*, 391 U.S. 367, 377 (1968):

"... we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. . . ."

**A. Fourteenth Amendment Overbreadth Has Been Denied By This Court In A Similar Ban On Advertising.**

Plaintiffs argue that the statutory ban on advertising at bar is overbroad. However, a similar statute in *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935), withstood overbreadth attack on Fourteenth Amendment grounds. Since the overbreadth less-restrictive-alternative test in First Amendment cases is similar to the overbreadth less-restrictive-alternative test under the due process clause, the First Amendment overbreadth argument must fail. See, Comment, *Less Drastic Means and The First Amendment*, 78 Yale 464 (1968-69).

The due process less-restrictive-alternative principle was entrenched enough by 1927 to prompt a comment by Brown, *Due Process of Law, Police Power and the Supreme Court*, 40 Harv. L. Rev. 943, 954-56 (1927). Nevertheless, in 1935

this Court rejected that due process overbreadth attack on directly analogous facts in *Semler*.

The following observation from *Semler* is precisely applicable to the instant case:

"The state court defined the policy of the statute. The court said that while, in itself, there was nothing harmful in merely advertising prices for dental work or in displaying glaring signs illustrating teeth and bridge work, it could not be doubted that practitioners who were not willing to abide by the ethics of their profession often resorted to such advertising methods to 'lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them.' *The legislature was aiming at 'bait advertising.'* 'Inducing patronage,' said the court, 'by representations of "painless dentistry," "professional superiority," "free examinations," and "guaranteed" dental work' was, as a general rule, 'the practice of the charlatan and the quack to entice the public.'

"We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is



generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards.

"It is no answer to say, as regards appellant's claim of right to advertise his 'professional superiority' or his 'performance of professional services in a superior manner,' that he is telling the truth. In framing its policy the legislature was not bound to provide for determinations of the relative proficiency of particular practitioners. The legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule even though in particular instances there might be no actual deception or misstatement" (Emphasis supplied; 294 U.S. at 611-13).

#### B. The Overbreadth Test Should Not Be Applied To Professional Advertising.

The First Amendment overbreadth test was developed to prevent "chilling" of fragile First Amendment rights. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Advertising is not such a fragile First Amendment right. As stated in footnote 24 of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 48 L.Ed.2d 346 at 364 (1976):

"In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are common sense differences between speech that does 'no more than propose a commercial transaction' *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S., at 385, 37 L.Ed.2d 669, 93 S.Ct. 2553, and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of

protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely." [Emphasis supplied.]

Since advertising is not a First Amendment right requiring stringent protection, minimal incursions of the right cannot be deemed substantial when compared to the vital interest in preserving professional standards, *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935); *Cf. Head v. New Mexico Board of Examiners*, 374 U.S. 424 (1963). See also *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972), *cert. denied*, 409 U.S. 934 (1972). Since the hard, durable nature of advertising takes advertising out of the mainstream of the First Amendment and since a "right to know" justification has clearly been held to be on the periphery of the First Amendment, see *Broadrick v. Oklahoma*, 413 U.S. 601, 614 (1973), citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); the First Amendment overbreadth review in the case of professional advertising is not a strict test at all, and should be comparable to the Fourteenth Amendment overbreadth review that occurred in *Semler*.

Dorothy Fahs Beck's dissertation, *The Development of the Dental Profession in the United States, A Study in the Natural History of a Profession*, submitted to the Univer-



sity of Chicago in December, 1932, and on file at the American Dental Association Library, Chicago, Illinois, states at pages 176-178:

"The increasing number of dentists brought practitioners in more direct competition with each other for patients. With the increasing population density and complexity of dental practice, itinerant practice became a phenomenon of the past. Dentists settled down to resident practices, dependent upon clienteles drawn from immediately surrounding areas. Dental education and dental practice also became more standardized. Advertising, therefore, was no longer needed to impart information regarding the time and place where the dentist was available, the type of work he performed, and the character of his training. Its sole function became that of a tool of competition with other dentists within the same area. *As such, advertising rapidly degenerated into glaring misrepresentations and exaggerated statements.*

"Those dentists practicing in residential sections found that their practice succeeded easily without advertising. Their reputations for highly skilled workmanship and their intimate daily contacts with the community life were sufficient to assure them an adequate clientele. *To them the custom of advertising in its then exaggerated and misleading form was not only an unnecessary and burdensome expense but also a serious hazard to the professional respect and trust which had been the key to their personal success.* It degraded in the eyes of the public the dignity of their jealously-guarded professional position into that of a grasping, self-seeking craft.

"Dentists practicing in large urban areas, when forced to use advertising as a tool of competition, also came to hate the custom, for it threatened to consume the bulk of their profits. They also had opportunity to experience the injustice done to many dentists because

of the fact that the public was unable to recognize exaggerated claims and distinguish between good and poor service in such a complex activity as dental service. Temporarily at least, he who most cleverly and enticingly presented claims of superiority and low fees drew the most patients, while better trained and more capable men sat idle in their offices as the price of their honesty and modesty.

"It was these changed circumstances which reduced the function of advertising to a mere tool of competition that gradually forced the recognition of the inadequacy of advertising as a professional practice. *As the situation approached a critical point, steps were rapidly taken in the direction of definite institutional control of advertising, as well as of other phases of the conduct of dentists.* So strong was the sentiment in favor of such control by the time early dental societies were organized that from the outset control of professional conduct became one of the primary functions of dental societies." [Emphasis supplied.]

The dentists' experiences, historically documented by Ms. Beck in her dissertation, are quite similar to that of United States patent attorneys. See, *e.g.*, Hobbs, Lawyer Advertising: A Good Beginning But Not Enough, 62 A.B.A.J. 735, 737 (1976).

Plaintiffs rely heavily on the contention that some regulation of professional advertising is necessary to control fraudulent and misleading advertising, but that a total ban against advertising goes too far.

This argument is contrary to the considered judgment of numerous state courts which have enforced state regulation. The specific examples that follow parallel the experience of the patent attorneys that regulation by narrowly defined "fraudulent" advertising statutes invites too many abuses. Thus, in *In re Campbell*, 142 P.2d 492 (Wash., 1943), the court stated at 497:

"To describe in express terms a faulty advertisement is practically to instruct the defendant how to evade it, and as to the limitless variations of language, symbols, and verbal or pictorial allurements, no human ingenuity could possibly anticipate and forestall them."

In holding the advertisement deceptive and fraudulent, the court emphasized that the advertiser promised his personal attention to readers of his ads but neglected to mention that the Seattle office was a clinic and that the advertiser's time was consumed by twelve other dental offices in California.

The rationale for broad advertising regulations advanced in *Laughney v. Maybury*, 259 Pac. 17 at 20 (Wash., 1927) demonstrates the difference between broad regulation of discretionary services and broad regulation of *prescribed* standardized products. There is only one variable in the case of prescribed standardized products. Therefore, there is no reason to protect the public from selecting a pharmacist for a *prescribed* drug solely on the basis of an advertised \$ .50 per bottle difference in price, but the equities are different where there exist many variables. The cost of selecting unnecessary professional services on the basis of loss-leader advertising may be unnecessary surgery or the unnecessary or incompetent filling of teeth that promotes painful, expensive root canal work in later life. The *Laughney* court noted the tendency for those in good health to imagine ailments and for the physically ill to be unduly susceptible to persuasion and to grasp at shadows. A tangible object may be examined and approved before purchase, but treatment is comparable to an adhesion contract and must be paid for whether beneficial or not, the court said.

*Modern System Dentists, Inc. v. State Board of Dental Examiners of Wisconsin*, 256 N.W. 922 (Wis. 1934), holds

that "advertising particular services or appliances at a price from \$—— up would offend the statute because it tends to deceive or mislead the public." Indeed, the practice seems quite analogous to "bait and switch" advertising.

The following cases lend support to the argument that allowing "good" professional advertising necessarily means allowing "borderline" advertising and that it is much too difficult to police the abuses of these borderline cases.

In *Kelley v. Texas State Board of Dental Examiners*, 530 S.W.2d 132 (Tex. Civ. App., 1975) the court was required to consider whether a pamphlet written by a dentist and entitled "One Answer to Cancer" was the use of advertising statements of a character tending to mislead or deceive the public. The court held that it was.

In *Levine v. State Board of Registration and Examination in Dentistry*, 1 A.2d 876, 877 (N.J. 1938) the court passed on the validity of a series of advertisements citing prices for plates, fillings, and anesthetic. The advertisement touted the dentist for doing work better and cheaper. The court noted that even if the advertisement in issue was not *per se* deceptive, that type of advertising gave the unscrupulous dentist an opportunity to deceive his patients.

So, also, in *Donohue v. Andrews*, 47 P.2d 940, (Ore., 1935) the facts illustrate that it is easy to drum up business without informing the public. There a dentist advertised "Modern Dentistry; Not Cheap Dentistry, but Modern Dentistry Cheap." The *Donohue* court held such advertising to be impermissible noting that when dealing with professional advertising, "the rules of the marketplace do not apply."

The plaintiffs, as well as all those who advocate advertising in the professions, rest their argument on the



contention that advertising will inform and reduce prices. Although plaintiffs argue that the reduction of prices is something that all economists agree upon, they do not explain the manner in which prices are reduced and whether that is short term or long term economic analysis. Indeed, one of plaintiffs' own authorities acknowledges that the allowance of full-scale advertising would result in increased advertising costs in order to neutralize the advertising of other lawyers with a probable result of an increase in the fees charged. See, *Monopolies and Mergers Commission, Services of Solicitors in England and Wales, a Report on the Supply of Services of Solicitors in England and Wales in Relation to Restrictions on Advertising*, Ch. 5, §121 (Her Majesty's Stationery Office, 1976, reprinted at Plaintiffs' Appendix 7a).

In addition, advertising may cause serious allocation problems in any profession in which it is introduced. Advertising generally will reduce prices only after there are economies of scale which result from increased concentration. In other words, advertising may well drive out of the professions the smaller, highly competent but less economically resourceful professionals, permitting the larger, more economically resourceful firms to increase their share of the market and, in turn, by taking advantage of the economies of scale the larger firms may reduce prices. Significantly, this may well lead to the large professional firms attaining monopoly power and increased prices in the long run. Thus, one commentator has observed:

"Hence, after advertising has been generally adopted, and the trade settles down again with some sort of equilibrium, the pattern of the industry will have changed; sales will have been concentrated among a smaller number of firms, and the size of the 'representative firms' will have increased." (Kaldor, "The Economic Aspects of Advertising" in *Readings In Current Economics*, Irwin Ed. (1958).)

Especially in the case of non-price advertising, most economists agree that cost generally will escalate with advertising and, thus, prices would be lower in the absence of non-price advertising. Hamberg, *Principles of a Growing Economy* 668 (1961).

Another problem with advertising in the context of a profession is that there is always the possibility that advertising may do what it is designed to do, namely, sell unnecessary services. Thus, there is a substantial likelihood that the public may utilize professional services not out of necessity but because of the necessary puffing that good advertising causes. Samuelson, *Economics* 500-01 (6th ed. 1964).

Interestingly enough, the marketing correspondent of a large Chicago newspaper has written a series of articles in which he regards the discussions among proponents of advertising for lawyers on the subject of advertising as being especially naive. He states:

"Some consumers reportedly have called for lawyer advertising, contending that legal costs would go down if lawyers competed. I think the opposite would happen. If lawyers advertised it would tend to cause more demand for legal services and prices would go up. Consumers also would have to pay for the cost of advertising, as they do for every product or service advertised." (App. 11)

In addition, this correspondent also has discussed the abuses in connection with advertising by banks, as well as abuses he anticipates if lawyer advertising is permitted. (App. 10, 11)

From the foregoing discussion, it would appear that there is sufficient controversy over the question of whether advertising is beneficial to the public when utilized by professionals so that it cannot be argued that those states



which have enacted legislation regulating advertising have violated the First Amendment.

This is an extremely sensitive area in which most of the focus has been on the short run and not enough attention has been directed to the entire impact on the professions. Economically it may well be that it may be to the disadvantage of the public if the professions become as highly concentrated as the rest of the American economy.

### C. The Statute Is Constitutional "As Applied"

Historically and functionally the rationale for stringent controls of professional advertising enunciated in *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935) has been time tested and is justified. That balance has not been tipped by any concededly weak First Amendment rights which advertising may have. The *Virginia Pharmacy* case only stands for the proposition that certain types of advertising are entitled to First Amendment consideration, not full blown absolute protection. Advertising is not overly sensitive to First Amendment chill. *Virginia Pharmacy* can easily be distinguished on its facts from advertising in a professional setting. Prescriptions for standardized drugs are not the same thing as discretionary professional services purchased from professionals of varying competence and ethics. Therefore, the statute should be declared constitutional "as applied" and on the strength of a facial "overbreadth test." The balance among government and advertising professionals and consumers is struck in favor of the government. Stringent advertising control, especially in the health area, is the only effective means of protecting the public. The *Virginia Pharmacy* argument that tipped the scales is not present

here. There consumers were already protected by a prescription, therefore, further government protection was unnecessary the Court said. Here, there is no prior protection. Accordingly, government protection is in order and stringent advertising controls have proven to be the most efficacious means of providing that protection.

In conclusion, there are substantial reasons why state governments have decided to regulate advertising among professionals. Even if the contention that advertising will lower prices and increase demand has short term justification, the long term economic analysis may be quite different. Clearly, the scale is not so overbalanced as to hold state regulation unconstitutional.

## II.

### ENFORCEMENT OF PROHIBITIONS AGAINST THE ADVERTISEMENT OF PROFESSIONAL SERVICES DOES NOT VIOLATE THE SHERMAN ACT.

Initially, it should be noted that this Court's consideration of this matter, for Sherman Act purposes, must be limited to the issue of whether disciplinary Rule 2-101(B) constitutes price fixing so as to be a *per se* violation of the Sherman Act under the authority of *United States v. Gasoline Retailers Association, Inc.*, 285 F.2d 688 (7th Cir. 1961), which held that an agreement between gasoline retailers not to advertise prices was a *per se* violation of the Sherman Act.

Such limitation on this Court is mandated by the record below because the Supreme Court of Arizona had no occasion to make a rule of reason analysis with respect to the effect of DR-2 101(B). Rather, the court held that this prohibition against the advertisement of the price of legal

services did not constitute a *per se* violation of the Sherman Act, relying upon *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) and *Parker v. Brown*, 317 U.S. 341 (1943), for its holding.

Consequently, plaintiffs' attempt, throughout their brief, to broaden the scope of the Court's inquiry to include a determination as to whether a ban on all lawyer advertising violates the Sherman Act is somewhat misleading. Thus, any determination by this Court with respect to whether the ban on advertising violates the Sherman Act should be expressly limited to price advertising. This also presumes that this Court will now hold that footnote 17 in *Goldfarb* does not require a rule of reason analysis for every alleged violation of the Sherman Act involving professionals. This footnote is the most persuasive argument opposing such a holding, and we urge it on the Court. The remand of *United States v. Nat'l Society of Professional Engineers*, 422 U.S. 1031 (1975) supports this conclusion.

The differences between the state action issue involved in the instant case and the many statutes affecting the dental profession are sufficient and, therefore, we make no argument with reference to state action.

### CONCLUSION

The reason this brief amicus curiae is being filed is to demonstrate to the Court the vast network of regulation in the states on advertising in the dental profession and the reasons for such regulation.

The major economic justification given by plaintiffs, if valid at all, is not so overwhelming that this Court should in this decision sweep so broadly as to permit advertising in all the professions.

The consumers may well be the class of people who are most injured by a broad decision on advertising on the state of the record before this Court. Accordingly, the Supreme Court of Arizona should be affirmed.

Respectfully submitted,

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# APPENDIX



**APPENDIX**

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

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**NO. 76-316**

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**JOHN R. BATES and VAN O'STEEN,**

**Appellants,**

**v.**

**STATE BAR OF ARIZONA,**

**Appellee.**

**STIPULATION**

William C. Canby, on behalf of John R. Bates and Van O'Steen, and Peter M. Sfikas, on behalf of the American Dental Association, do hereby stipulate that the American Dental Association may file an amicus brief with the Supreme Court of the United States in the above captioned matter.

*/s/ William C. Canby, Jr.*

William C. Canby, representing  
John R. Bates and Van O'Steen

*/s/ Peter M. Sfikas*

Peter M. Sfikas, representing  
the American Dental Association

IN THE  
SUPREME COURT OF THE UNITED STATES

---

NO. 76-316

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JOHN R. BATES and VAN O'STEEN,

Appellants,

v.

STATE BAR OF ARIZONA,

Appellee.

STIPULATION

John P. Frank, on behalf of the State Bar of Arizona, and Peter M. Sfikas, on behalf of the American Dental Association, do hereby stipulate that the American Dental Association may file an amicus brief with the Supreme Court of the United States in the above captioned matter.

/s/ *John P. Frank*

John P. Frank, representing  
the State Bar of Arizona

/s/ *Peter M. Sfikas*

Peter M. Sfikas, representing the  
American Dental Association

All state legislatures regulate dentists' advertising practices. Most states explicitly regulate advertising although three do so in general terms. *Arizona Revised Statutes*, Tit. 32, Ch. 11, §32-1263 (1976 Sup.) provides that a dentist's license may be suspended or revoked for unprofessional conduct. *Minnesota Statutes Annotated*, Ch. 150A.11 (1970) provides that public advertising by dentists may be controlled by reasonable rules and regulations of the board and *Vermont Statutes Annotated*, Tit. 26, Ch. 13, §809 (1975) provides that advertising not in conformity with the code of ethics of the American Dental Association is grounds for discipline.

Thirty-eight states prohibit the advertising of prices:

Alabama	Alaska	Arkansas
California	Colorado	Connecticut
Delaware	Dist. of Columbia	Florida
Hawaii	Idaho	Illinois
Kansas	Kentucky	Louisiana
Maine	Maryland	Massachusetts
Michigan	Mississippi	Missouri
Nebraska	Nevada	New Hampshire
New Jersey	North Dakota	Ohio
Oklahoma	Oregon	Pennsylvania
Rhode Island	Texas	Utah
Virginia	Washington	West Virginia
Wisconsin	Wyoming	

Thirty-nine states prohibit fraudulent, false or misleading advertising:

Alabama	California	Colorado
Connecticut	Delaware	Florida
Hawaii	Idaho	Illinois
Indiana	Kansas	Kentucky

#### App. 4

Louisiana	Maine	Maryland
Massachusetts	Michigan	Missouri
Montana	Nebraska	Nevada
New Hampshire	New Mexico	New York
North Carolina	North Dakota	Ohio
Oklahoma	Oregon	Pennsylvania
Rhode Island	South Carolina	Texas
Utah	Virginia	Washington
West Virginia	Wisconsin	Wyoming

The advertisement of "painless dentistry" is prohibited by the following 35 states:

Alabama	Alaska	Arkansas
California	Colorado	Connecticut
Delaware	Dist. of Columbia	Hawaii
Idaho	Illinois	Indiana
Kansas	Kentucky	Louisiana
Maine	Maryland	Massachusetts
Michigan	Mississippi	Missouri
Montana	Nebraska	Nevada
New Hampshire	New Mexico	Ohio
Oregon	Pennsylvania	Rhode Island
Texas	Utah	Virginia
West Virginia	Wyoming	

Advertising professional superiority is prohibited by the following 39 states:

Alabama	Alaska	Arkansas
California	Colorado	Connecticut
Delaware	Dist. of Columbia	Florida
Hawaii	Idaho	Illinois
Indiana	Kansas	Kentucky
Louisiana	Maine	Maryland
Massachusetts	Michigan	Mississippi

#### App. 5

Missouri	Montana	Nebraska
Nevada	New Hampshire	New Mexico
Ohio	Oklahoma	Oregon
Pennsylvania	Rhode Island	Texas
Utah	Virginia	Washington
West Virginia	Wisconsin	Wyoming

Sixteen state statutes refer to directory listings:

Alabama	Arkansas	Colorado
Connecticut	Florida	Illinois
Kentucky	Maine	Minnesota
New York	North Carolina	North Dakota
Oklahoma	South Dakota	Tennessee
Wyoming		

The following 45 states regulate dentists who advertise through utilization of signs:

Alabama	Alaska	Arkansas
Colorado	Connecticut	Delaware
Dist. of Columbia	Florida	Georgia
Hawaii	Illinois	Indiana
Iowa	Kansas	Kentucky
Louisiana	Maine	Maryland
Massachusetts	Michigan	Minnesota
Mississippi	Missouri	Montana
Nebraska	Nevada	New Hampshire
New Jersey	New Mexico	New York
North Carolina	North Dakota	Ohio
Oklahoma	Oregon	Pennsylvania
Rhode Island	South Dakota	Tennessee
Texas	Utah	Virginia
West Virginia	Wisconsin	Wyoming



## App. 6

Twenty-seven states either directly or indirectly regulate newspaper advertising by dentists:

Alabama	Alaska	Arkansas
Connecticut	Dist. of Columbia	Florida
Georgia	Hawaii	Illinois
Iowa	Kansas	Kentucky
Louisiana	Maine	Massachusetts
Michigan	Missouri	Montana
Nevada	North Dakota	Oklahoma
Rhode Island	South Carolina	Texas
Utah	West Virginia	Wyoming

Forty-three states prohibit the use of solicitors or press agents:

Alabama	Alaska	Arkansas
California	Colorado	Delaware
Dist. of Columbia	Florida	Georgia
Hawaii	Idaho	Illinois
Indiana	Iowa	Kansas
Kentucky	Louisiana	Maine
Maryland	Michigan	Mississippi
Missouri	Montana	Nebraska
New Jersey	New Mexico	New York
North Carolina	North Dakota	Ohio
Oklahoma	Oregon	Pennsylvania
Rhode Island	South Carolina	Tennessee
Texas	Utah	Virginia
Washington	West Virginia	Wisconsin
Wyoming		

## App. 7

The specific statutory references are as follows:

- Code of Alabama*, Tit. 46, §§120(22), 120(23) (1973 Cum. Sup.)
- Alaska Statutes*, Tit. 8, Ch. 36, §08.36.310 (July, 1973)
- Arizona Revised Statutes*, Tit. 32, Ch. 11, §32-1263 (1976-1977 Cum. Sup.)
- Arkansas Statutes Annotated*, Tit. 72, Ch. 5 §§72-544 and 72-560 (1975 Sup.)
- California Code Annotated*, Business and Professions, Ch. 4, §§1680 and 1701 (West Sup. 1976)
- Colorado Revised Statutes*, Tit. 12, Art. 35, §12-35-118 (1975 Cum. Sup.)
- Connecticut General Statutes Annotated*, Tit. 20, Ch. 379, §20-114 (1958)
- Delaware Code Annotated*, Tit. 24, Ch. 11, §§1131 and 1132 (1974)
- District of Columbia Code Encyclopedia*, Tit. 2, Ch. 3, §§2-311 (1966)
- Florida Statutes Annotated*, Tit. 30, Ch. 466, §§466.24, 466.27 (1965)
- Code of Georgia Annotated*, Ch. 84-7, §84-724 (1976 Cum. Pocket Part)
- Hawaii Revised Statutes*, Tit. 35, Ch. 448, §§448-4, 448-20 (1968)
- Idaho Code*, Tit. 54, Ch. 9, §54-924 (1975 Cum. Pocket Part)
- Illinois Annotated Statutes*, Ch. 91, §§62(17), 72b (1966)
- Burns Indiana Statutes*, Tit. 25, Ch. 1, §25-14-1-19 (1974)
- Iowa Code Annotated*, Tit. 8, Ch. 153, §153.25 (1972)
- Kansas Statutes Annotated*, Ch. 65, Art. 4, §§65-1436, 65-1437, 65-1439 (1972)
- Kentucky Revised Statutes*, Ch. 313, §§313.130, 313.140 (1972) §313.240 (1974 Cum. Sup.)
- Louisiana Revised Statutes*, Tit. 37, Ch. 9, §775 (1974)

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*Maine Revised Statutes Annotated*, Tit. 32, Ch. 15, §§1009, 1014 (1964)  
*Annotated Code of Maryland*, Art. 32, §§11, 12 (1957) and §16 (1976 Sup.)  
*Annotated Laws of Massachusetts*, Ch. 112, §52A (1975)  
*Michigan Statutes Annotated*, Vol. 10, Ch. 122, §§14.629(16) and 14.629(17) (1969) and §14.629(18) (April, 1976 Cum. Sup.)  
*Minnesota Statutes Annotated*, Ch. 150, §150A .11 (1970)  
*Mississippi Code Annotated*, Tit. 32, Ch. 4, §8773 (1972 Cum. Sup.)  
*Vernon's Annotated Missouri Statutes*, Tit. 32, Ch. 332, §§332.068, 332.160, 332.380, 332.480 (1966)  
*Revised Codes of Montana*, Tit. 66, Ch. 9, §66.917 (1947)  
*Revised Statutes of Nebraska*, Ch. 71, Art. 1, §§71-147, 71-148 (1943)  
*Nevada Revised Statutes*, Tit. 54, Ch. 631, §631.050 (1974)  
*New Hampshire Revised Statutes Annotated*, Ch. 317, §317-A:17 (1975 Sup.)  
*New Jersey Statutes Annotated*, Tit. 45, Ch. 6, §45:6-7 (1963)  
*New Mexico Statutes Annotated*, Chs. 66 and 67, Art. 4, §§66-913, 67-914 (1961)  
*McKinney's Consolidated Laws of New York*, 16 Education §6509 (1976-1977 Cum. Annual Pocket Part)  
*General Statutes of North Carolina*, Ch. 90, Art. 2, §90-41 (1975)  
*North Dakota Century Code*, Tit. 43, §§43-28-18, 43-28-25 (1960)  
*Baldwin's Ohio Revised Code*, Tit. 47, Ch. 4715, §§ 4715.18, 4715.30 (1975 Cum. Issue)  
*Oklahoma Statutes Annotated*, Tit. 59, Ch. 7, §§328.28, 328.31, 328.32, 328.50 (1971)

## App. 9

*Oregon Revised Statutes*, Tit. 52, Ch. 679, §679.140 (1975)  
*Purdon's Pennsylvania Statutes Annotated*, Tit. 63, Ch. 4, §122(i) (1968)  
*General Laws of Rhode Island*, Tit. 5, Ch. 31, §§5-31-8, 5-31-9 (1957)  
*Code of Laws of South Carolina*, Tit. 56, Ch. 9, §56-636.19 (1975 Cum. Sup.)  
*South Dakota Compiled Laws*, Tit. 36, §§36-6-28, 36-6-29, 36-6-29.1 (1969)  
*Tennessee Code Annotated*, Tit. 63, Ch. 5, §63-554 (1976)  
*Vernon's Texas Civil Statutes*, Tit. 71, Ch. 9, Art. 4548(f) and 4548(g) (1976)  
*Utah Code Annotated 1953*, Tit. 58, Ch. 7, §58-7-7 (1963)  
*Vermont Statutes Annotated*, Tit. 26, Ch. 13, §809 (1975)  
*Code of Virginia 1950*, Tit. 54, Ch. 8, §54-187 (1976)  
*Revised Code of Washington*, Tit. 18, Ch. 18.32, §18.32.290 (1961)  
*West Virginia Code*, Ch. 30, Art. 4, §30-4-7 (1976)  
*Wisconsin Statutes Annotated*, Tit. 40A, Ch. 447, §447.07 (1974)  
*Wyoming Statutes*, Tit. 33, Ch. 15, §33.192.12 (1975 Cum. Sup.)

JUN 3 1975  
**Lawyers advertise?**

## Watch out, McBarrister

An article in a recent edition of the American Bar Assn. Journal proposed that ethical codes be changed so that lawyers can advertise.

The author of the article, Jerome Wilson, a New York lawyer, even went so far as to have Foote, Cone & Belding prepare some sample ads for an imaginary law firm called Littleford & Weekley.

I thought it was an entertaining article until I discovered that Wilson was serious about his proposal. Right in the middle of what could have been a humorous piece, he started citing landmark cases and such legal tra-la as the "right to know."

"It is time," Wilson wrote, "to amend the code and lift the ban on advertising. It is time the legal profession entered the nation's open marketplace."

I THINK THE LEGAL PROFESSION has enough image and reputation problems already without taking on the vulnerabilities of advertising.

If lawyers were allowed to advertise, I'll bet that Sears, Roebuck would take over the legal business in a couple of years. Sears would go out and recruit the best young lawyers in the country (from non-prestigious law schools). Every store would have its own lawyer sitting behind a desk, probably near the hardware section.

If a person wanted a will made out, he could have the paperwork completed while picking out the color of Sears paint he needs for his garage.

The same way it has its Kenmore appliances, Craftsman tools and Diehard batteries, Sears would pick a brand name for its legal service. It probably would be Legal Guardian.

"Hi, I'm Bob Griesse. When I had to negotiate my last contract with the Miami Dolphins, I went to someone I know and trust, my Legal Guardian at Sears. . .")

There would be different level and prices for service. For a routine will, name change or traffic ticket, "Sears good quality" would do the job. But for a major bankruptcy or a murder case, "Sears best" would be recommended.

SEARS WOULD LEAD THE law field for a while, but then McDonald's would move swiftly into the business with a franchise operation. They probably would call it McBarrister.

McBarrister would stress speed, rather than quality. It would have franchised storefront law offices all over the country. Want a will? They're all made out. Just come in and fill out the blanks.

The only trouble McBarrister will have is if a person needs something a little different. Then it will take hours to have it taken care of.

Popular Mechanics would zoom into the area after that with a simple "sue-it-yourself" program of monthly installments. You could send in every month for your own kit on a special aspect of the law. ("Make a writ of habeas corpus in your own basement in less than two hours for only \$2.97!")

And when that catches on, people finally will realize that they don't need lawyers. Advertising will have killed the legal business.

And that, Mr. Wilson, is what will happen if lawyers start to advertise. If you need more proof, call the head of your local ad agency. You will find that there is another category of service business that does not advertise: ad agencies.

## Bank panel checking on industry's ad ethics

The Bank Marketing Assn. has formed a committee to determine whether there are abuses in bank advertising and, if so, to establish a program to correct them.

The formation of the committee apparently was nudged along by a speech made in September by Alan B. Eirenberg, first vice president of Exchange National Bank.

Eirenberg, who has been appointed to the BMA committee, has urged the group to establish guidelines and a code of ethics to regulate bank advertising.

Jack W. Whittle, vice president-marketing at Continental Bank here, is chairman of the seven-member committee.

About 25 per cent of the nation's 14,000 banks are members of the BMA. But the membership includes the vast majority of the larger banks.

A spokesman said that the committee's prime target is not fraudulent advertising as much as that which is unclear and sometimes misleading.

From this writer's standpoint, the establishment of such a committee is sorely needed. Banking is one of the most complicated "products" that is advertised on a mass scale. I think the regulation of this advertising should come from within the industry rather than from federal and state government bureaucracies.

AS ONE EXAMPLE OF questionable advertising, Eirenberg has pointed out the promotion of "free checking accounts" by many banks across the country. Some are "free" if the customer maintains a \$100 or \$200 balance. Some are "free" if the customer maintains a savings account. Some are "free" if the customer signs up for a bank credit card.

It seems that banks are being too free with the word "free."

And now that some of the banks are willing to take an objective (I hope) look at their advertising, it's time for the savings and loan associations to do the same thing.

## Lawyers seem naive about advertising use

About 200 lawyers from all over the country gathered in Chicago last weekend to consider whether they should use 20th-Century methods to sell their 19th-Century product.

The event was a meeting of local and state officials of the American Bar Assn. The subject was a proposal that would allow lawyers to advertise their services.

I was invited to the meeting, but I did not attend because I have a loud laugh and I didn't want to interrupt the proceedings.

It's not that I think lawyers are funny. Usually they're not, but when they are considering advertising, I think the results can be hilarious.

CONSIDER FOR A MOMENT that a provision in the proposal would prohibit advertising if it contained "laudatory comments" about the lawyer. That, counselors, is what advertising is all about.

Don't get me wrong. I believe lawyers should have the right to advertise, but I think they should exercise discretion and not advertise.

That isn't hedging. I also think lawyers should have the right to hit themselves on the head with a hammer. But I don't think they should exercise that right . . . with a couple of exceptions.

The ABA and most state bar associations have prohibited their members from advertising. In many cases these rules were ridiculously picky because some of them even prohibited such practices as sending out holiday greeting cards, using boldface listings in the telephone book or pasting the lawyer's special field of practice on his shingle.

SEVERAL REASONS were offered at the ABA meeting, but I don't think any of them justify the practice of advertising.

Some consumers reportedly have called for lawyer advertising, contending that legal costs would go down if lawyers competed. I think the opposite would happen. If lawyers advertised, it would tend to create more demand for legal services, and prices would go up. Consumers also would have to pay for the cost of advertising, as they do for every product or service advertised.

Proponents of this proposal want lawyers to engage in a relatively sophisticated business technique — advertising — but they seem to be saying this this is being done for the good of the consumer.

Bullbleep!

Advertising is a selling tool. It is a pretty sophisticated technique, yet, some lawyers want to jump into it without a marketing plan, research or other such basics. Big law firms don't have sales forces calling on prospective clients. They use no other routine marketing tools, yet, they want to advertise. It's like choosing Mt. Everest for your first mountain climb.

DEC 9 1975

LAWYERS REALLY ARE parity products. Bar associations do not acknowledge good lawyers and bad lawyers. Just lawyers. I don't think advertising would help the consumer at all. I feel that the first lawyers to advertise would be the ones who have not been able to make it on referrals and recommendations.

In all fairness, I should say that I think the ABA chieftains don't even know what they're talking about when they discuss advertising.

I think they are talking about having a lawyer state in a telephone book that he specializes in tax, divorce, etc. They want him to be able to send out greeting cards, or announcements when he opens for business. And maybe some of those desk calendars at the end of the year.

If a lawyer can do all of this without any "laudatory comments" about himself, let him do it. But don't call it advertising.



Supreme Court, U. S.  
FILED

DEC 18 1976

MICHAEL BODAK, JR., CLERK

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

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**No. 76 - 316**

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**JOHN R. BATES and VAN O'STEEN,**

*Appellants,*

vs.

**STATE BAR OF ARIZONA,**

*Appellee.*

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**On Appeal from the Supreme Court of Arizona**

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**BRIEF FOR  
AMERICAN VETERINARY MEDICAL ASSOCIATION  
AS AMICUS CURIAE**

---

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**On Appeal from the Supreme Court of Arizona**

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**BRIEF FOR  
AMERICAN VETERINARY MEDICAL ASSOCIATION  
AS AMICUS CURIAE**

---

*May It Please The Court:*

The American Veterinary Medical Association respectfully submits this brief *amicus curiae* in support of the appellee. Written consents to the filing of this brief have been obtained from all parties and have been filed with the Clerk pursuant to Rule 42.



## INTEREST OF AMICUS

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The American Veterinary Medical Association ("AVMA") is the national organization of the veterinary medical profession. Historically, AVMA has served both the profession and the public by (i) preparing a Model Veterinary Practice Act for the consideration of the various state legislatures, and (ii) recommending ethical standards for the guidance of those veterinarians who desire to belong to AVMA. Advertising standards represent an important aspect of AVMA's work and one that is essential to the proper functioning of a responsible veterinary medical profession.

The veterinary profession's advertising policies are currently being challenged, as are the advertising ethics of several other professions. In December 1975, the Federal Trade Commission initiated a formal investigation of veterinary advertising standards along with many other issues.<sup>1</sup> Also, earlier this year, the Arizona Attorney General filed suit against the Arizona Veterinary Medical Association attacking certain restrictions on advertising by veterinarians within the State of Arizona, among other things.<sup>2</sup>

Here, appellants Bates and O'Steen attack the validity of attorney advertising restrictions under untenably broad theories of Sherman Act and First Amendment construc-

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<sup>1</sup> Federal Trade Commission File No. 762-3074.

<sup>2</sup> *State of Arizona v. Arizona Veterinary Medical Ass'n*, Ariz. Superior Ct., County of Maricopa (No. C-334115).

tion. Their theories overarch vast differences in the public-private regulation of the various professions and run roughshod over intricate questions of social policy affecting the professions. AVMA and the veterinary medical profession are vitally interested in the preservation of sound professional attitudes and practices under the laws of this Nation. Their advertising standards are essential to this goal and serve the best interests of society.

## ARGUMENT

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Appellants openly justify promotional advertising within the professions as a means to accentuate the commercial side of professional activity at the expense of professional service to the public. Appellants admit they advertised specifically to increase volume and thus to alter the economics of law practice in favor of their standardization of so-called "routine" legal services. The ethics of appellants' operational system are plainly the concern of the bar, not of AVMA. Nevertheless, we reiterate the Court's own recent observation that:

"Physicians and lawyers, . . . do not dispense standardized products; then render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." (*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 96 S.Ct. 1817, 1831 n.25 (1976)).

Here, appellants' advertisement was premised on an oversimplification of the manner in which a consulting profes-

sional person functions. The inherently misleading and destructive character of such advertising techniques has motivated regulatory effects of long standing among the professions, including the veterinary medical profession.

We stress two facts at the outset. *First*, appellants seem to have designed a so-called "professional clinic" to dispense what is virtually a scrivener service by paralegal and clerical assistants. It does not appear that appellants offer significant professional judgment with respect to their clients' individualized problems or their clients' need for the requested service. This is hardly the manner in which attorneys, physicians, veterinarians and other professional persons render personalized and judgmental services to the public. Medical professionals, for example, must engage in individualized consultation and observation in order to diagnose disease, prescribe dangerous or restricted drugs, and watch even for uncomplained-of communicable diseases in their everyday client contacts. The commercial needs of appellants' peculiar operation neither typify the professions nor substantiate the broad legal theories they propose.

*Second*, the Court does not have a full factual record, either here or in prior cases, regarding the legal issues of advertising in the veterinary and human medical professions. The self-regulatory experience of lawyers has been, if anything, atypical among the professions. The veterinary medical profession, like many others, is regulated by state licensing boards empowered to establish licensing criteria and binding ethical standards for persons who wish to practice within the jurisdiction. Rarely, if at all, are veterinary medical associations involved in the regulatory process, except insofar as they may petition state governments and otherwise express the profession's views.

This brief is divided into three principal parts, which will demonstrate in respective sections that:

(i) The state-action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), creates a federal antitrust exemption for private professional activity conducted in compliance with mandatory state ethical standards;

(ii) Professional advertising restrictions are reasonable, ancillary restraints that do not violate Section 1 of the Sherman Act; and

(iii) Appellants' First Amendment arguments should be rejected in light of the inherently misleading character of the professional advertising exemplified by this case.

# I.

## **PARKER v. BROWN EXEMPTS PROFESSIONAL ADVERTISING RESTRICTIONS FROM SHERMAN ACT APPLICATION, NOTWITHSTANDING SO-CALLED "PRIVATE INITIATIVE" BY THE PROFESSIONS.**

The professional associations of this Nation have a long and salutary history of writing ethical standards for the guidance of their membership. The professions hold a collective trust to society, and their practitioners have the fullest working knowledge of the duties, the shortcomings and the potential abuses most directly affecting the particular profession.

Appellants propose restrictions on the state-action antitrust exemption of *Parker v. Brown*, 317 U.S. 341 (1943), that would effectively preclude association initiatives for the regulation of their professions. Appellants attack the state-action doctrine with a broadaxe:



"Since the [appellee] bar association exercised a high degree of individual choice in privately initiating the ban upon advertising, the prohibition violates the Sherman Act despite its adoption into a state regulation of binding effect." (Brief for the Appellants, p. 27).

Appellants have seized upon the peculiar integration of the Arizona bar and state supreme court to blur the distinction between private and public rulemaking. (*Id.*, pp. 60-64). Appellants seem to contend, in the politest possible terms, that the state court lacks detachment and independence as a rulemaking body and, on these grounds, that the advertising ban represents no true state interest.

Appellants' distrust of the public-private relationship in Arizona state lawmaking supplies no proper basis for their sweeping assault on *Parker v. Brown*. Indeed, the Court recognized in *Parker* that California's agricultural proration program was "proposed by [private] producers" and, to become effective, "must also be approved by a referendum of producers." Nevertheless, the Court ruled "... it is the state, acting through the Commission, which adopts the [proration] program and which enforces it with penal sanctions, in the execution of a governmental policy." (*Parker v. Brown*, *supra*, 317 U.S. at 356). The *Parker* decision leaves no room for appellants' "private initiative" theory of antitrust liability.

Moreover, the full impact of appellants' state-action arguments cannot be appreciated on the present record alone. The formalized regulatory duties of the "integrated" Arizona State Bar hardly typify the advisory relationships which generally exist between state governments and many professions. Certainly this *amicus* knows of no "rubber

stamp" among the state governments of this Nation, despite appellants' contrary insinuation.

To illustrate, the AVMA exercises no state-delegated disciplinary authority over licensed veterinarians. Its Judicial Council has undertaken, nonetheless, to draft and periodically to update a Model Veterinary Practice Act for consideration by the various state legislatures.<sup>3</sup> Many states have enacted portions of the Model Act, providing for executive appointment of licensing boards independent of the AVMA and of its constituent state veterinary associations. Of special note, the Model Act (§11) recommends that a licensing board should be empowered to discipline a veterinarian for:

"The use of advertising or solicitation which is false, misleading, or is otherwise deemed unprofessional under regulations adopted by the Board."

AVMA does not promulgate or recommend advertising standards for the consideration of state licensing boards. Again, however, AVMA's Judicial Council does publish *Principles of Veterinary Medical Ethics* in which the Council attempts to formulate a professional consensus on objectionable advertising practices, applicable to AVMA's member veterinarians: *e.g.*, advertising personal superiority over one's colleagues, advertising secret remedies or exclusive methods, or advertising fixed fees for given services. Some state licensing boards may have considered AVMA's recommendations; others may not have. Whatever the case, AVMA has well served the public and the profession by rendering its opinion on these matters.

<sup>3</sup> The current Model Veterinary Practice Act is reprinted in the *Journal of the American Veterinary Medical Association*, Vol. 167, No. 11, at pages 1021-28 (Dec. 1, 1975).



No responsible profession could reasonably be expected to continue this important work if it were threatened with antitrust treble damage liability arising either (1) from its mere communication of recommended ethical standards to state officials, or (2) from the profession's later reliance on any such recommended standards if and when they were given the force of state law. The first of these two liability concepts was expressly repudiated by the Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).<sup>4</sup> Here, appellants try to finesse *Noerr* by proposing the second liability concept, which in truth is nothing but a circumlocution that would, as a practical matter, revive the first form of liability. The cardinal principles of this Court's *Noerr* decision could never tolerate an antitrust rule that condemns, directly or indirectly, the participation of professional associations in ethical rulemaking by the states.

Appellants find no help in the Court's recent decisions interpreting *Parker v. Brown*. To the contrary, appellants' entire "private initiative" theory seems calculated to avoid the force of *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790 (1975), where the Court stated:

"The threshold inquiry in determining if an anti-competitive activity is state action of the type the Sherman Act was not meant to proscribe is *whether the activity is required by the State acting as sovereign*.

... Here we need not inquire further into the state-action question because it cannot fairly be said that

<sup>4</sup> In *Noerr*, the Court upheld the right of certain railroads and other parties collectively to conduct a publicity campaign for the purpose of inducing favorable legislation. Sherman Act liability may not be imposed for an exercise of the right to petition government. (See 365 U.S. at 139-40).

the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent." (Emphasis supplied).

The Virginia bar's fee schedules in *Goldfarb* had not been officially adopted by the state supreme court as mandatory codes of professional behavior; indeed, enforced fee schedules appeared to contravene the state's regulatory policy. (*Id.*, pp. 789-90). Here, of course, the Arizona advertising ban is required "by the State acting as sovereign."

Appellants turn to *Cantor v. Detroit Edison Co.*, 96 S.Ct. 3110 (1976), as support for their notion that any element of "private initiative" must preclude the state-action exemption. Their reliance is misplaced. In *Cantor*, while Detroit Edison's state-approved "light bulb supply" tariff was compulsory in the short term, the state Commission clearly had no intention to regulate the statewide distribution of light bulbs:

"Other utilities regulated by the Michigan Public Service Commission do not follow the practice of providing bulbs to their customers at no additional charge. The Commission's approval of [Detroit Edison's] decision to maintain such a program does not, therefore, implement any statewide policy relating to light bulbs. We infer that the State's policy is neutral on the question whether a utility should, or should not, have such a program." (96 S.Ct. at 3114).

Thus, not only the creation but the perpetuation of the light bulb supply program was realistically at the utility's private discretion:

"[T]here can be no doubt that the option to have, or not to have, such a program is primarily [Detroit Edison's], not the Commission's." (*Id.*, p. 3118).

Appellants gain nothing from the *Cantor* analogy. Rather, "[T]he States have a compelling interest in the prac-

tice of professions within their boundaries.” (*Goldfarb v. Virginia State Bar*, *supra*, 421 U.S. at 792). The states have a proper interest in *every* facet of professional conduct that touches the public, and historically they have regulated a broad range of professional activities.

The *Parker v. Brown* antitrust exemption ineluctably governs in these circumstances. In complying with the state’s regulations, neither the practitioner nor his professional association engages in a concerted restraint of trade within the purview of Section 1 of the Sherman Act; for as in *Parker* (317 U.S. at 350), the general application of any such restraint on professional advertising “derive[s] its authority and its efficacy from the legislative command of the state” and in no sense operates “by force of individual [private] agreement or combination.” The state itself may be susceptible to Supremacy Clause attacks for allegedly creating a restraint of trade that unreasonably derogates federal antitrust policy. But so long as the state’s command has force of law, its compulsory restraint operates on the profession without a private concert of action. Accordingly, the private sector neither incurs liability for its compliance, nor does it have the power to void the state’s restraint.

Appellants thus try to find private anticompetitive activity by the appellee State Bar which exists separately from the mere compliance with state law. What they formulate, in the end, is some sort of “private agreement” between the State Bar and the American Bar Association *to advocate and enact* the advertising ban presently at issue.<sup>5</sup>

<sup>5</sup> See Brief for the Appellants, pp. 64-65.

Appellants’ last-ditch theory cannot withstand scrutiny, for in their effort to escape *Parker v. Brown*, appellants have run squarely into the Court’s holding in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, *supra*.

## II.

### PROFESSIONAL ADVERTISING RESTRICTIONS, WHETHER BY THE STATES OR BY THE ASSOCIATIONS, CONSTITUTE REASONABLE, ANCILLARY RESTRAINTS PERMISSIBLE UNDER THE SHERMAN ACT.

*Parker v. Brown* resolves any question of private antitrust illegality in the professions’ compliance with state ethical standards having general and binding effect. Of necessity, the state-action exemption operates despite allegations (as in *Parker* itself) that the ultimate regulatory effect is anticompetitive and would violate the Sherman Act if it were accomplished without state mandate. Appellants erroneously presume the inapplicability of *Parker v. Brown* in order to reach their substantive Sherman Act considerations.<sup>6</sup>

Even then, appellants’ antitrust argument consists mainly of oversimplifications and truisms that do not come to grips with the hard issues raised by professional advertising and its regulation. Key points in their argument are barely more than assertions: (1) that restrictions on direct

<sup>6</sup> Appellants are in certain respects unclear whether, on the one hand, they are primarily attacking the State Bar’s allegedly “private” actions (as implied by appellants’ *Parker v. Brown* arguments), or on the other hand, are challenging the validity of Arizona’s sovereign prohibition of lawyer’s advertising (as implied when they claim to be “simply seeking to invalidate the restraint, not to impose treble-damage liability upon the State Bar or the American Bar Association,” at pp. 64-65).



price advertising by professionals invoke a *per se* rule of Sherman Act illegality (Brief for Appellants, p. 56); (2) that price advertising by lawyers, and impliedly by other professionals, is certain to bring a decrease in prices and in costs to the consumer (*id.*, p. 11); and (3) that appellants' own advertisement cannot be deemed deceptive or misleading because they performed the advertised services at the promised rates (*id.*, pp. 16-17, 45-46).

AVMA submits that none of these assertions is a self-evident truth or principle suitable for use in judging professional advertising restrictions under the federal anti-trust laws.

**A. Professional Advertising Restrictions Are Properly Governed by the "Rule of Reason," Not by Per Se Standards of Illegality.**

In *Goldfarb v. Virginia State Bar*, *supra*, the Court explicitly cautioned against the facile application of anti-trust concepts developed in other business settings to the conduct of the professions. As Chief Justice Burger explained:

"The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." (421 U.S. at 787-88 n.17).

These well-founded observations directly contradict any *per se* approach to restraints on the practice of professions, whether those restraints arise from state action or even from private consensus among practitioners.

The Court has upheld rules of *per se* Sherman Act illegality only for the very few classes of agreements or practices whose "pernicious effect on competition and lack of any redeeming virtue" had become apparent from prior judicial experience. *Northern Pacific Railroad Co. v. United States*, 356 U.S. 1, 5 (1958); see *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). No *per se* rule applies to advertising restraints generally, and certainly none can be invoked as to advertising restrictions governing the professions.<sup>7</sup>

Restrictions on professional advertising can only be judged under the "rule of reason" of the Sherman Act. The Court has recognized that most trade regulations cause some degree of commercial restraint, and yet these do not offend the Sherman Act where the restraint is merely ancillary to a reasonable and proper regulatory objective. Thus:

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint

<sup>7</sup> Appellants' principal authority for a *per se* rule on advertising restraints, *United States v. Gasoline Retailers Ass'n., Inc.*, 285 F.2d 688 (7th Cir. 1961), does not support their theory. There, the court determined that a conspiracy between service station operators and a union local—which included among other things a price advertising ban—cause a *price fix* that was itself *per se* unlawful under Sherman Act precedents. (285 F.2d at 691).



is applied. . . . The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." (*Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918)).

The proper objectives of professional advertising restrictions brook no dispute. In other contexts, the Court has upheld society's compelling interest in restraining professional advertising activities in order to avoid misleading the public and to maintain professional standards and competence. (*Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 611-12 (1935); see also *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489-91 (1955)). These concerns reflect the fundamental reality that society's interest in professional services is in large measure non-commercial in character. By its very nature, promotional advertising would establish a commercial ethic of individual self-advancement, an ethic that contradicts the historic function and public trust of the professions.

Appellants bear a heavy burden under these circumstances to show serious ancillary restraints which override the clear and longstanding purposes of professional advertising restrictions. Far from doing so, appellants rely upon quasi-economic arguments which, in fact, highlight the reasonableness and necessity of the very restrictions they attack.

#### **B. Unrestricted Advertising of Professional Services Has Grave Hidden Costs to the Public.**

Appellants contend that fee advertising by lawyers and other professionals would automatically decrease prices,

suggesting a simplistic comparison between advertising restrictions and the fee schedules in *Goldfarb*. Appellants' price-reduction theory has no basis in fact, not even if consideration were limited to (1) the unit price, (2) of routine procedures implemented without professional judgment, and (3) without any adjustment for the cost (both in monetary and emotional terms) of dispensed services which a consulting professional person might persuade the client are unnecessary or inadvisable. The stripped-down economics of appellants' case offer poor criteria for evaluating the propriety of unrestricted professional advertising. Of most immediate importance, though, appellants' economic contentions gravely oversimplify the restraint-of-trade issue presented to the Court.

Appellants stress the fact that their legal practice is "a highly unusual one" in which the emphasis "is very clearly upon matters of a routine nature." (Brief of Appellants, pp. 6, 8). More specific characteristics of appellants' practice are as follows:

(1) They are experimenting with a so-called "systems approach" to the practice of law, ". . . in which many repetitive tasks are put together by attorneys into systems which can then be operated by paralegals." (*Id.*, p. 7). Appellants never explain what function the professional attorney performs in their "system" beyond the drafting of form documents, the organization of paralegal and clerical workers, and the required signature of documents for court filing.

(2) Appellants appear to apply no significant professional judgment to the individual circumstances of their clients. This characteristic is particularly evident from appellants' refusal to accept either contested divorces or divorce matters in which the potential clients "have not reached agreement with their

spouses on the terms of the divorce." (*Id.*, p. 8). In short, appellants will undertake to prepare and execute papers, but they are apparently unwilling to render professional advice, not even on the basic alternatives for property settlement in an uncontested divorce.

In all matters which appellants accept, *the client must tell the attorneys* exactly what he wants and needs to have done.

(3) Appellants nevertheless advertise publicly under the headline "DO YOU NEED A LAWYER? LEGAL SERVICES AT VERY REASONABLE FEES." (*Juris.Stat.*, Exh. A).

(4) The stated purpose of appellants' advertisement is to generate large-volume business from people who *believe* they know precisely what "legal service" they need and whose questions for the attorney are simply procedural-mechanical. (*Brief for Appellants*, p. 10).

Appellants practice law almost as foremen of a mass production system. At the same time, they seek to advertise fees for the rendering of professional "legal services."

Projected consumer cost-savings lie at the heart of appellants' argument, but their empirical analogies are revealing. Appellants refer to studies showing the reduction of retail prices, (1) for prescription drugs and (2) for eyeglasses, in states which have permitted price advertising in those product lines. (*Brief for Appellants*, pp. 11-12). Both analogies involve products rather than judgmental services, and even then, products which the pharmacist or optician typically prepares on the order and specification of a patient's consulting physician.

Appellants' economic proposition, based on these analogies, is premised upon reducing the practicing lawyer to

a dispenser of standardized products who may decline to exercise professional judgment on the client's need for a requested service. Appellants offer this proposition in the name of increased volume, greater efficiency and reduced unit costs. Conceivably, prices *might* be lowered if individual lawyers were encouraged to run "specials" on uncontested divorces, if physicians did so on children's shots, and if veterinarians did so on rabies vaccines—all on the condition (whether fairly disclosed or not) that the client or patient was the sole judge of his own needs and would receive no professional advice in the bargain.

Every true profession, however, has a diagnostic and advisory function. Even on the most routine matters, clients-patients frequently have only a general idea of the service they need. And those clients-patients who do have specific requests must sometimes be dissuaded from their plans or be urged to take an alternate course of action that may be either more or less costly than the original request. Consulting professionals encounter these situations daily. Medical practitioners may have explicit requests for unnecessary surgery; requests for potentially dangerous drugs; and requests for simple treatments when an examination reveals the need for more serious measures. Legal practitioners confront a different range of problems. Clients may offer pre-arranged divorce settlements without adequate provisions for the maintenance of insurance policies; they may seek declarations of bankruptcy on misconceptions of the dischargeability of specific debts; and they may request, in infinite varieties, a lawyer's procedural expertise to facilitate questionable transactions.

When professionals cease to provide judgment and begin merely to dispense, the individual and social costs can be



enormous. We concur most vigorously with Chief Justice Burger's separate comments in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 96 S.Ct. 1817, 1832 (1976):

"Attorneys and physicians are engaged primarily in providing services in which professional judgment is a large component. . . .

". . . I think it important to note also that the advertisement of professional services carries with it quite different risks than the advertisement of standard products."

Here, appellants have advertised their legal clinic in order to promote volume and minimize the unit price of a standardized service. They have done so, and have constructed their case, on a false theory that the "sovereign consumer" can prescribe his own professional services in the same manner he selects a detergent. Unfortunately, the client-patient who *does* get exactly what he requests from a professional dispensary may not receive what he really needs, and yet having been "served", he may not seek separate professional advice.

The professions have struggled continuously over the years with consumer misunderstanding of their functions. Advertising by professionals has the capability to accentuate that misunderstanding, and the result has staggering implications in social cost. The professions owe society their best effort to regulate misleading advertising within their own ranks, and such efforts cannot reasonably violate the Sherman Act. Competition among professionals based on public misunderstanding is not competition in the economic or legal sense.

### C. Appellants' Promotional Advertising of Professional Fixed Fees Was Inherently Deceptive.

Appellants further contend that their advertisement cannot be considered misleading because they performed competent services at the advertised rates. To the contrary, appellants' conduct provides a vivid illustration of the deleterious purposes that unrestrained professional price advertising can serve.

Advertising is a subtle medium that carries many messages besides that of product availability and price. Advertising communicates an entire ethic as to the manner in which people should evaluate their needs in relation to the product or service being advertised and as to the factors they should emphasize in making a selection. Here, appellants advertised pre-packaged legal services at fixed fees, and they did so precisely to promote fee competition on discrete and standardized services. The inescapable message of an advertisement of this nature is that clients-patients can and should shop for professional service on this basis alone. Appellants' message has misleading and dangerous connotations.

*First*, many clients-patients do not and would not understand appellants' standardization and pre-packaging of the advertised legal service, and these clients are deceived outright. Laymen can be expected to trust that professional practitioners will always perform the essentials of professional service despite any apparent haste—that counseling not rendered is counseling not needed. For this reason alone, appellants' advertising technique would be fatally misleading without a franker disclosure of the *de minimis* counseling service which seems to underlie their clinic "systems approach."



*Second*, appellants cannot openly promote their pre-packaged legal services without implicitly urging the public to accept routinized procedures in lieu of normal professional consultation. Once underway on a large scale, such advertising could be expected to mold the public's concept of the profession's function and services. Some laymen may be persuaded, as many may already believe, that they are fully capable to define their own needs and that professionals exist solely to dispense pre-packaged services. Misconceptions of this sort are easier to promote than they are to dispel. When appellants advertise their peculiar form of professional relationship, their message touches the entire profession in its effort to bring service to the public.

*Third*, the appellants purvey a form of professional relationship that not only minimizes counseling on the client's immediate problem but discourages broader consultation on matters beyond the limited purpose of a visit. Appellants' system plainly seems designed to sell a discrete service rather than a relationship. By contrast, the character of a genuine professional contact can be illustrated from familiar procedures in the medical fields: thus, a dentist may be asked to perform a hygienic prophylaxis, and yet he routinely examines the patient's teeth whether requested to or not; the veterinarian may be asked by his client to administer a vaccine, and yet he observes the animal for visible disease which could be communicable to humans or to other animals; the physician may be asked to vaccinate a child, and yet he inquires about the child's general health. This is the nature of professional service as it has existed and should continue to exist in this country.

The conscientious practice of a profession demands judgment *and* initiative; it may involve counseling of the client-patient that was not expected. These are facets of professional service that cannot readily be priced-out and packaged, nor can they be advertised effectively to a public which does not have the expertise to value services it may not even foresee needing. Individualized advertising that depreciates the importance of genuine professional services and the underlying professional relationship is inherently misleading.

Appellants seem to have placed themselves squarely within this category of deceptive advertising, insofar as they have dissected legal service into discrete operations, abandoned the counseling function of their profession, and advertised the residue as "LEGAL SERVICES AT VERY REASONABLE FEES." To restrain advertising of this character can hardly violate the Sherman Act, whether such restraints are imposed by the state or by the profession.

### III.

#### THE INHERENTLY MISLEADING CHARACTER OF APPELLANTS' ADVERTISING PRECLUDES ANY RELIANCE ON FIRST AMENDMENT PROTECTIONS OF COMMERCIAL SPEECH.

Appellants' theory of First Amendment "commercial free speech" likewise presumes that their fixed-fee/standardized-service advertisement was non-deceptive. To the contrary, the inherently misleading connotations of appellants' advertising and their implied depreciation of professional services far exceed any recognized constitutional guarantees.

Appellants oversimplify the governing First Amendment principles. Commercial speech admittedly warrants a degree of constitutional protection; but for compelling practical reasons, the Court has previously distinguished commercial from non-commercial speech, noting that "... a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." (*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, *supra*, 96 S.Ct. at 1830 n.24). In many contexts, commercial speech requires special regulation only in its "time, place, and manner." (*Id.*, p. 1830). And yet even as to source and content restrictions, the Court expressly withheld judgment in *Virginia State Board of Pharmacy* with regard to First Amendment applications to the legal and medical professions:

"Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." (*Id.*, p. 1831 n.25).

Here, appellants not only neglect these considerations but confirm, by their own facts, the uncompensated dangers of professional fee advertising.

*First*, appellants' fixed-fee/standardized-service advertising projects an image of professional activity that directly contradicts the historic function of the professions. The Court has observed in *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975), that:

"To the extent that commercial *activity* is subject to regulation, *the relationship of speech to that activity* may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged." (Emphasis supplied).

If ever "the relationship of speech to activity" called for advertising regulation, appellants' conduct here poses such a case. The states have a compelling interest in defining the character of services that a profession *should* bring to the public and, thus, an essential corollary interest in regulating conduct, such as unfettered advertising, that threatens in the long-run to depreciate those services.

*Second*, the inherently misleading nature of appellants' advertising transforms it into a form of "commercial speech" that the Court has on no occasion deemed worthy of constitutional protection. Chief Justice Burger foretold the present situation in his separate comments in *Virginia State Board of Pharmacy*:

"Nor am I sure that even advertising the price of certain professional services is not inherently misleading, since what the professional must do will vary greatly in individual cases." (96 S.Ct. at 1832).

The deceptive qualities of appellants' advertising, previously described, go far beyond the issue of "competent work at the promised fee." Rather, their message to consumers—their portrayal of standardized, non-consultative functions as "legal service"—supplies hard confirmation of the inherently misleading character of professional fixed-fee advertising.

**CONCLUSION**

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For the foregoing reasons, the judgment of the Supreme Court of Arizona should be affirmed.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

No. 76-316

JOHN R. BATES AND VAN O'STEEN,  
*Appellants,*

v.

STATE BAR OF ARIZONA,  
*Appellee.*

On Appeal from the Supreme Court of Arizona

BRIEF FOR THE VIRGINIA STATE BAR,  
COMMONWEALTH OF VIRGINIA, AS AMICUS CURIAE

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*Appellee.*

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On Appeal from the Supreme Court of Arizona

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BRIEF FOR THE VIRGINIA STATE BAR,  
COMMONWEALTH OF VIRGINIA, AS AMICUS CURIAE

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This brief as *amicus curiae*, in support of the petition of appellee, is filed by the Virginia State Bar, Commonwealth of Virginia, by its counsel, the Attorney General of Virginia, pursuant to Rule 42(4) of the Rules of this Court.

#### INTEREST OF THE AMICUS CURIAE

The Virginia State Bar is a defendant in two pending cases which involve the legality of a prohibition against the advertising of legal services. *Hirschkop v. Virginia State Bar*, Civil Action No. 75-629-A (E.D. Va. 1975); *Consumers Union of United States, Inc. v. American Bar Association*, Civil Action No. 75-0105-R (E.D. Va. 1975).

### QUESTIONS PRESENTED

1. Whether a ban against promotional advertising of legal fees promulgated by a state supreme court violates the First Amendment.

2. Whether, in light of *Parker v. Brown*, 317 U.S. 341 (1943), the Sherman Act is applicable to a Disciplinary Rule promulgated by the Supreme Court of Arizona and to enforcement of the Disciplinary Rule by the State Bar of Arizona pursuant to the Court's command.

3. Whether, if the Sherman Act is applicable, enforcement of the Disciplinary Rule by the State Bar of Arizona constitutes a contract, combination or conspiracy in unreasonable restraint of trade.

### SUMMARY OF ARGUMENT

I. This case involves the question of the extent to which a state can regulate the conduct of attorneys in the public interest. It is undisputed that courts have inherent power to regulate the practice of law. Advertising by attorneys with limited exceptions is inimical to the public interest.

To prohibit only "false, misleading and deceptive" advertising will not sufficiently protect the public: (a) Because legal services are not fungible, any advertisement of fees for specific legal services is inherently deceptive. Reasonable fees can only be established after consultation; (b) an attorney cannot comply with DR 2-106(B) if he advertises standard fees. (c) A general "false, misleading and deceptive" standard would be unenforceable given the variety of advertisements likely to be published by enterprising and imaginative attorneys and the size of the disciplinary machinery available to police such activity.

There is no constitutional infirmity to a prohibition of advertising by attorneys. The necessity of such laws in the professions has been recognized since *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935). *Bigelow v. Virginia*, 421 U.S. 809 (1975) and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 96 S.Ct. 1817 (1976), do not require a different result. *Bigelow* involved an effort by Virginia to regulate activities outside of Virginia. Arizona is, of course, regulating the practice of law in Arizona. *Pharmacy* involved the advertisement of drug prices. Drugs are fungible goods, and no public interest is served by a prohibition against price advertisement. Legal services are not fungible, not standard, and not subject to quality control.

II. *Parker v. Brown*, 317 U.S. 341 (1943), held that Congress did not intend the Sherman Act to apply to activity otherwise violative of the antitrust laws, where such activity was authorized by a state legislature, even if the activity was initiated and promulgated by private competitors in the marketplace. Accordingly, where a state, through one of its constitutionally created branches, has made a decision that some policy other than completely free and open competition is in the public interest, federal courts are not free to review the wisdom of the enactment under the guise of the antitrust laws.

That the *Parker* rationale is still viable today is shown by this Court's analyses thereof and reference thereto in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), *Cantor v. Detroit Edison Co.*, 96 S.Ct. 3110 (1976), and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 96 S.Ct. 1817 (1976).

The implicit holding in *Goldfarb* requires that the instant case be affirmed. A defense based upon the *Parker* doctrine

was not sustained because the activity held to violate the Sherman Act was not commanded by the state as sovereign, but rather was only implicitly approved by an inferior state body. In the instant case, the challenged action was required by the Supreme Court of Arizona, the highest judicial authority of the state and an entity with no possible economic interest in the result of the command.

In *Cantor*, a majority of this Court held that approval by an inferior state agency of otherwise illegal conduct engaged in by private entities was not protected by the *Parker* doctrine, at least where the civil action did not charge state officials with illegal conduct. Although a majority of the Court set forth "unfairness" and "implied repeal" tests under which an exemption might be applicable, a plurality held that where the acts of state agencies or officials were challenged, the *Parker* doctrine was applicable, and the analysis need go no further. A majority of the Court held where (1) the command came from the state as sovereign, and (2) the acts of state agencies or officials were challenged, the antitrust laws were inapplicable. Because the State Bar of Arizona is a state agency and was commanded to implement the challenged Rule of the Arizona Supreme Court, the Sherman Act is inapplicable to the challenged conduct of the Bar.

This principle is bolstered by the decision in *Olsen v. Smith*, 195 U.S. 332 (1904), where it was recognized that no combination was formed when agents of the state simply performed their legal duties. This Court, moreover, realized that the antitrust laws are not the proper vehicle to challenge state regulation.

If the *Parker* doctrine is not applicable in the instant case, it then becomes necessary to determine whether any actions of Appellees are violative of the Sherman Act. A

necessary ingredient of any Section 1 violation is some type of contract, conspiracy, or combination. Although it is not clear who the alleged conspirators are in the instant case, it is clear that under any factual situation, the alleged conspirators were ordered to engage in the challenged action. Under the *Olsen* rationale, *supra*, since all parties simply were performing their legal duties, no combination in law existed. Moreover, because if any agreement did exist, it was among other entities who were an integral part of the judiciary of the State of Arizona, the rationale of the intraenterprise conspiracy cases is applicable, and it cannot be held that the state judiciary conspired with itself. See *Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

If this Court holds that a combination did exist, then the legality of the alleged restraint should be tested under the rule of reason rather than the *per se* rule. Although one court has held that an agreement not to advertise, in at least some circumstances, is akin to price fixing and is *per se* unreasonable, *United States v. Gasoline Retailers Association*, 285 F.2d 688 (7th Cir. 1961), this Court has recognized that legitimate professional objectives make it improper to automatically apply antitrust standards and concepts which originated in other contexts to the professions. *Goldfarb* at 787 n.17. A *per se* standard is applicable only after long experience demonstrates that the challenged practice is both unnecessarily anticompetitive and has no redeeming virtue.



### PRELIMINARY STATEMENT

This case involves the question of to what extent a state can regulate the conduct of attorneys in the public interest. Only last year, this Court while finding that minimum fee schedules violated the Sherman Act, nevertheless stated:

"We recognize that States have a *compelling interest* in the practice of professions within their boundaries, and as a part of their power to protect the public health, safety and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' *United States v. Oregon State Medical Society*, 343 U.S. 326, 336 (1952), see also *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 611-613 (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the court.' See *Sperry v. Florida*, 373 U.S. 379, 383 (1963); *Cohen v. Hurley*, 366 U.S. 117, 123-124 (1962); *Law Students Research Council v. Wadness*, 401 U.S. 154, 157 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions." (Emphasis added.) *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792-93 (1975).

It should not be overlooked that the disciplinary rule under attack here is that promulgated by a sovereign court governing the conduct of attorneys within its jurisdiction. It has long been the rule that courts have inherent power to regulate the practice of law. *Lathrop v. Donohue*, 367 U.S. 820

(1961); *Theard v. United States*, 354 U.S. 278 (1957); *Powell v. Alabama*, 287 U.S. 45 (1932).

DR 2-101 in substance prohibits advertising by attorneys with specific exceptions. The premise upon which the rule is based is that advertising by attorneys is inimical to the public interest. EC 2-9 provides:

"The traditional ban against advertising by lawyers, which is subject to certain limited exceptions, is rooted in the public interest. Competitive advertising would encourage extravagant, artful, self-laudatory brashness in seeking business and thus could mislead the layman. Furthermore, it would inevitably produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers. Thus, public confidence in our legal system would be impaired by such advertisements of professional services. The attorney-client relationship is personal and unique and should not be established as the result of pressures and deception. History has demonstrated that public confidence in the legal system is best preserved by strict, self-imposed controls over, rather than by unlimited, advertising."

### ARGUMENT

Appellants' basic position is that a general prohibition against advertising is unnecessary and unconstitutional. Their view is that a proscription against "false, misleading and deceptive information" is all that is required. They assert that the information which they wish to publish is not misleading and is necessary for a consumer to make an intelligent choice of an attorney. Appellants' position is unpersuasive for at least three important reasons: (1) information regarding legal fees, which appellants wish to publish and which is prohibited by the Code of Professional Responsibility, is deceptive and misleading; (2) a standard

of "false, misleading and deceptive" as applied to the information sought to be published is unenforceable; and (3) the information sought to be published is not in the public interest.

**1. The Information Which Appellants Seek To Publish Is Deceptive And Misleading.<sup>1</sup>**

In substance, the prohibited information which appellants wish to publish relates to an attorney's fees for legal services. These cannot be provided in a way which would be less harmful than helpful to the public. Appellants' belief that fee information would be helpful in the selection of an attorney is based upon at least two false premises: (1) there are certain "standard" legal services, easily capable of definition, fees as to which rarely vary; and (2) application of a "false, misleading and deceptive" standard to the advertisement of legal fees would prevent any evils flowing from that practice.

Turning to the "standard" legal services, an example from the proposed advertisement will suffice to show the fallacy in this approach. Appellants advertise the fee for an uncontested divorce. No mention is made of property settlements or custody arrangements. Clearly, these factors would cause substantial variation in that fee. Moreover, is there any room in appellants' "systems approach"<sup>2</sup> for determining whether a couple should be divorced or whether there is a possibility of a reconciliation? It is precisely because of such

<sup>1</sup> There is clearly no First Amendment protection for deceptive or misleading advertising. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *Konigsberg v. State Bar*, 366 U.S. 36, 49 and n. 10 (1961); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 189-90 (1948).

<sup>2</sup> Appellants' Brief at 7.

unanswered questions that fee advertising should be prohibited. It is often true that an attorney has a standard fee for certain types of legal services. This fee cannot be stated in the abstract, however. It can only be quoted after an assessment of a potential client's legal problems. Such an assessment cannot, of course, take place absent a consultation.

Apart from the problem of the impossibility of a client's knowing what a "standard" legal service is, there is in addition the ethical requirement of the Code that a lawyer consider certain factors in a determination of a reasonable fee for his services. DR 2-106(B) lists those items which must be taken into consideration:

- "(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- "(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- "(3) The fee customarily charged in the locality for similar legal services.
- "(4) The amount involved and the results obtained.
- "(5) The time limitations imposed by the client or by the circumstances.
- "(6) The nature and length of the professional relationship with the client.
- "(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- "(8) Whether the fee is fixed or contingent."

Only items (3) and (7) could be considered without regard to the individual client involved. It is impossible for a

lawyer to advertise a "standard fee" while meeting the requirements of DR 2-106(B).

**2. A Standard Of "False, Misleading And Deceptive" As Applied To The Information Sought To Be Published Is Unenforceable.**

It is argued that there is no need to prohibit advertising because false and misleading conduct is already prohibited by DR 1-102. One need only view a few commercials on television to realize how ineffective a "false, misleading and deceptive" standard is as applied to advertising under the jurisdiction of the Federal Trade Commission. How much more ineffective it would be in an area involving legal services, which are not standard and not fungible. It is well known that the disciplinary process is nearly always manned by volunteer lawyers who receive no compensation. It would be virtually impossible to police the myriad of kinds of advertising which could be promoted by enterprising attorneys. The disciplinary machinery would collapse under its own weight. The problem was stated perhaps as succinctly and well as it could be by Michael Frank, Executive Director of the Michigan Bar and author of the American Bar Association's new proposed DR 2-102, when he responded to the question whether he would agree that DR 1-102 prevented false and misleading statements made by lawyers:

"I would totally disagree. I would say that the rule prohibits such conduct, certainly doesn't prevent it."<sup>3</sup>

<sup>3</sup> *Consumers Union of United States, Inc. v. American Bar Association*, *supra*, Frank deposition, p. 74.

**3. The Information Appellants Seek To Publish Is Not In The Public Interest.**

**A. THERE IS NO CONSTITUTIONAL INFIRMITY IN PROHIBITING ADVERTISING BY ATTORNEYS.**

The landmark case with regard to advertising by professionals is *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935). In upholding an Oregon statute prohibiting the advertisement of prices by dentists, Chief Justice Hughes, writing for the Court, stated:

"We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The Legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the marketplace. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards." 294 U.S. at 612.

*See also, Head v. New Mexico Board of Examiners*, 374 U.S. 424 (1963); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955); *Johnston v. Board of Dental Examiners*, 134 F.2d 9 (D.C. Cir.), *cert. denied*, 319 U.S. 758



(1943); *Toole v. State Board of Dentistry*, 300 Mich. 180, 1 N.W.2d 502, *appeal dismissed*, 316 U.S. 648 (1942).

*Toole* is particularly interesting since it involved challenges to statutes regulating the practice of dentistry on due process and free speech grounds. In upholding the statutes the Supreme Court of Michigan said:

"The claim that the Act violates the free speech section of the Constitution [Art. 2, § 4], and the due process section [Art. 2, § 15], as well as the Fourteenth Amendment to the Constitution of the United States, is fully answered in *Semler v. Oregon State Board of Dental Examiners* (citation omitted) . . . ." 1 N.W.2d at 504-505.

See also *Patterson Drug Company v. Kingery*, 305 F.Supp. 821 (W.D. Va. 1969); *Economy Optical Company v. Kentucky Board of Optometric Examiners*, 310 S.W.2d 783 (Ky. 1958); *Levine v. State Board of Registration and Examination in Dentistry*, 121 N.J.L. 193, 1 A.2d 876 (S.Ct. 1938); *Sherman v. State Board of Dental Examiners*, 116 S.W.2d 843 (Texas 1938).

That *Semler* has continued vitality is shown by the fact that it has been cited with approval by this Court in two recent cases. *Goldfarb v. Virginia State Bar*, *supra*, at 792-793; *Bigelow v. Virginia*, 421 U.S. 809, 825 n. 10 (1975). The reaffirmation of *Semler* in *Bigelow* is particularly significant since *Bigelow* was a First Amendment case.

Appellants place great reliance upon the *Bigelow* decision. The reliance is misplaced. Apart from the fact that the *Semler* line of cases was reaffirmed in *Bigelow*, the case does not support the proposition for which appellants cite it. Under attack in *Bigelow* was a criminal statute which prohibited the dissemination of information about abortions. *Bigelow* was convicted under the statute for advertising the

availability of abortions in New York where such medical services were legal. After stating that "commercial advertising enjoys a degree of First Amendment protection . . ." (421 U.S. at 809), the Court said:

"The State of course, has a legitimate interest in maintaining the quality of medical care provided within its borders. *Barsky v. Board of Regents*, 347 U.S. 442, 451 (1954). No claim has been made however, that this particular advertisement in any way affected the quality of medical services within Virginia.

\* \* \*

"Here Virginia is really asserting an interest in regulating what Virginians may hear or read about the New York services. It is, in effect, advancing an interest in shielding its citizens from information about activities outside Virginia's borders, activities that Virginia's police powers do not reach. This asserted interest, even if understandable, was entitled to little, if any, weight under the circumstances." 421 U.S. at 827-28.

Of course, in the instant case Arizona is regulating only the activities of attorneys within its borders.

It is also interesting to note that the Court in *Bigelow* did not analyze the Virginia statute under a "compelling interest" test, the standard normally associated with First Amendment issues. That the "speech" in that case was entitled to only a "degree" of protection manifests a less rigorous test for advertising than for noncommercial speech.<sup>4</sup> Moreover, even under a compelling interest test, the rule under attack here should be sustained.

Finally, there was no argument in *Bigelow* that the advertisement was deceptive, 421 U.S. at 828. For the reasons discussed, *infra*, the information which appellants seek to publish here is deceptive and misleading.

<sup>4</sup> See 89 Harv. L. Rev. 111, 119-120 (1975).

B. CONSUMERS HAVE NO CONSTITUTIONAL RIGHT TO COMPEL ADVERTISING BY LAWYERS.

Appellants place great reliance on the so-called "right to know" cases, finding their primary comfort in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 96 S.Ct. 1817 (1976). That case does not provide the decision in this case. There, this Court found that no State interest was served by a prohibition against the advertisement of drug prices and that the ban did not serve the public health. *Terry v. California State Board of Pharmacy*, 395 F.Supp. 94 (N.D. Cal. 1975), *aff'd*, 96 S.Ct. 2617 (1976), involved a statute similar to Virginia's. A primary distinction between those cases and advertising by lawyers is highlighted by a statement in the opinion of Judge Peckham in *Terry*. In distinguishing the *Semler* line of cases, he said:

"These cases upheld certain state regulations of the advertising of professional services. They are distinguishable from the present case in which the California statutes prohibit the advertisement of price of a commodity, a specific item prescribed and identified by a physician. The pharmacist does nothing more than provide exactly what the doctor ordered. While the pharmacist's function is very important and attendant with great responsibility and risk, *it is more akin to the provision of a product than the rendering of a service*, which is commonly thought of as involving greater flexibility and discretion on the part of the provider." (Emphasis added.) 395 F.Supp. at 108.

Legal services by contrast are not fungible. They are highly individualistic and not subject to reasonable quality control. For the reasons given, *supra*, it is not in the public interest to permit advertisement of fees.

4. The State Bar Of Arizona Has Not Violated Federal Antitrust Law.

A. FEDERAL ANTITRUST LAWS ARE NOT APPLICABLE TO THE DISCIPLINARY RULE, OR ACTION OF THE STATE BAR OF ARIZONA PURSUANT THERETO, CHALLENGED BY APPELLANTS.

In actuality, the question presented to this Court under the antitrust laws cannot be whether the challenged Disciplinary Rule falls within the state action exemption advanced by *Parker v. Brown*, 317 U.S. 341 (1943), if the doctrine of *Parker* retains any viability whatsoever; for if there is any life left in the state action exemption, certainly the doctrine applies in this case.

Yet it is clear that the rationale of *Parker* retains vitality, notwithstanding that the scope of its applicability may have been narrowed from that perceived by many attorneys before 1975. In fact, the very cases upon which some rely, when espousing *Parker's* demise, attest that the state action exemption lives, and is especially appropriate in the factual context of the case at bar. In both *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and *Cantor v. Detroit Edison Co.*, 96 S.Ct. 3110 (1976), this Court made it clear that the state action exemption is applicable in a proper case. Moreover, the passing reference to and citation of *Parker* in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 96 S.Ct. 1817 (1976), exemplifies this Court's support of proper state regulation of the professions, even when such regulation, if it had been initiated by those in the private sector of the economy, would violate antitrust principles.

The point of origin in explaining the applicability of the state action exemption is *Parker* itself. That case tested the validity of a California statute which authorized the establishment of admittedly anticompetitive marketing pro-



grams and acts pursuant thereto by state officials. Interestingly, those who actually established the programs were competitors in the market which was subject to the restraint of trade. Thus, the program was one of self-regulation, although ultimate authority to administer the program was placed by statute with the Director of Agriculture. Upon this set of facts, this Court noted that the program "was never intended to operate by force of individual agreement or combination," 317 U.S. at 350, but rather "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command." *Id.* Nothing in the Sherman Act even suggests or hints that the statute is intended to restrain state or official action directed by a state or its legislature.

Thus, the crux of *Parker* is that where a state has made a conscious decision that economic competition or some other policy goal of the antitrust laws is not the "summum bonum" in a particular relevant product market, *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 421 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970), Congress intended that the state's judgment be given credence and, *a fortiori*, federal antitrust laws are not applicable. There is no indication that Congress intended federal courts to second-guess the states in such matters to determine whether the directive of the state is wise or unwise. *Cf.*, *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

This Court's decision in *Goldfarb* is consistent with the *Parker* decision in all respects relevant to the case at bar. Although in both cases the state command concerned a general program rather than specific activity, and although in both, authority was delegated to subordinate state self-regulating bodies, and although opposite results were ren-

dered on the state action exemption question, the present set of facts neatly falls within the *Parker* doctrine, without offending the rationale of *Goldfarb*. Indeed, the case at bar presents a stronger set of facts for application of the state action exemption than did *Parker* itself.

*Goldfarb* holds that for the exemption to be sustained, the challenged activity must be "required by the state acting as sovereign." 421 U.S. at 790. This Court held that the minimum fee schedule there challenged was not required by Virginia statute or court rule, but instead was the action of the Virginia State Bar and a local bar association. If anything, the state as sovereign, through the Virginia Supreme Court, had directed attorneys "not to be controlled" by fee schedules." *Id.* at 789. Accordingly, it was held that the *Parker* rationale was inapplicable and that the challenged activity would be scrutinized under the Sherman Act.

Although cases subsequent to *Goldfarb*, decided by the Circuit Courts of Appeal for the Third and Fifth Circuits, relaxed the seemingly strict rule of *Goldfarb* by holding that the challenged action only need be intended or contemplated by the state in its sovereign capacity, *Duke & Co. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975), and *City of Lafayette v. Louisiana Power & Light Co.*, \_\_\_\_\_ F.2d \_\_\_\_\_ (5th Cir. 1976), the State Bar of Arizona need not rely on this more liberal principle. For in the case at bar, the state as sovereign, in the form of the Supreme Court of Arizona, clearly and without doubt, commanded the *specific* prohibition here in question by promulgating the challenged rule. Accordingly, the State of Arizona has made a reasoned judgment that the dangers of advertising in places, manners and content proscribed by the Disciplinary Rule outweigh any benefit there might be in the allowance thereof. Certainly, this judgment by the sovereign state should not be



overruled lightly, especially in the context of an antitrust analysis.

The weight of a rule promulgated by a state's supreme court is equal to that of a legislative enactment in determining whether the challenged directive is one of the state as sovereign. A command from any of the constitutionally coequal branches of government, *i.e.*, the legislative, the executive or the judicial, is of identical weight. Indeed, this was recognized in *Goldfarb*, especially when this Court noted "that the State of Virginia through its Supreme Court Rules [had not] required the anticompetitive activities of either respondent." 421 U.S. at 790. The paradigm has been echoed by the Antitrust Division of the United States Department of Justice: "Clearly the Legislature, the Judiciary or the Executive exercising those functions entrusted to them by the state constitution are the 'state as sovereign.'"<sup>5</sup> Any other decisional rule would defy logic.

Perhaps this Court's rationale for its holding in *Goldfarb* is synthesized and advanced most cogently by its passing reference to *Gibson v. Berryhill*, 411 U.S. 564 (1973). A state agency, where it is composed of competitors in the market regulated by the state, cannot promulgate "anti-competitive practices for the benefit of its members," *Goldfarb, supra*, at 791, unless it is commanded to do so by the state as sovereign. But this is not what happened in the case at bar. Here the challenged action was that of the Supreme Court of Arizona. Accordingly, even if the proscription of advertising is unwise, it cannot be assumed that the challenged prohibition was enacted to benefit State Bar of Arizona members, and the *Goldfarb* analysis is inapposite. The conclusion which must

<sup>5</sup> Address of Assistant Attorney General Donald I. Baker, Before the Council of the American Bar Association, Public Utility Law Section, Oct. 28, 1976.

be drawn is that nothing said in *Goldfarb* lends support to the thesis of the Appellants; in fact, *Goldfarb* detracts from their arguments. The facts of the case at bar are neatly congruent with that niche recognized by this Court in *Parker* and *Goldfarb*, where Congress did not intend the Sherman Act to apply.

*Cantor v. Detroit Edison Co.*, 96 S.Ct. 3110 (1976), offers the Appellants less solace than *Goldfarb*. One need look no further than the first paragraph of the opinion to discover that it is not apposite to the instant factual situation:

"In *Parker v. Brown*, . . . the Court held that the Sherman Act was not violated by state action displacing competition in the marketing of raisins. In this case we must decide whether the *Parker* rationale immunizes private action which has been approved by a State. . . ." *Id.* at 3112.

Apparently, a majority of this Court felt that the utility was asking that the *Parker* doctrine be *extended* to protect it. The majority questioned the applicability of *Parker* because the restraint involved had "substantial impact on the otherwise unregulated business of distributing electric light bulbs." *Id.* But the case at bar is not analogous to *Cantor*. The market for legal services is a regulated market; in every state, at the very least, the practice of law is a regulated occupation. The alleged restraint in the instant case, having been *commanded* by the State Bar of Arizona, clearly is state action as opposed to the *authorization* of conduct by a state regulatory commission subordinate to the state legislature. The doctrine of *Parker* needs no expansion to encompass the case at bar; the action here simply was not "private."

Because of the diversity of opinions, *Cantor* is somewhat difficult to analyze. However, none of the separate opinions

support the Appellants' argument. The majority, for example, in Part I of the opinion, carefully chose to view the action of the public service commission, not as a "command" of the state, but as "approval." Perhaps it was concerned that rather than carefully considering the utility's tariff before approving it, the process was one of automatic acceptance or "rubber stamping" of the utility's *fait accompli*; or perhaps the majority was concerned because the state's policy was "neutral" with respect to regulation of the light bulb market. It is difficult to make such arguments here. Even assuming, *arguendo*, that insufficient consideration was given the challenged Disciplinary Rule by the Supreme Court of Arizona at the time of its adoption, since the validity of the Rule was placed before that court in this very case, it cannot be argued seriously that mature consideration was not given; nor can it be argued that the state's policy is neutral on the question of whether the challenged prohibition should prevail.

But the Appellants argue that even if the command of the state is sufficient to meet the *Goldfarb* "threshold inquiry" test, 421 U.S. at 790, the actions of Arizona must pass muster under the "unfairness" and "implied repeal" tests of the *Cantor* plurality. 96 S.Ct. at 3117. Overlooked, however, is the fact that where the "threshold inquiry" test is met and the action of state officials challenged, the two-pronged *Cantor* test set forth in the plurality opinion is not even reached. Although it is true that state officials were challenged in *Goldfarb*, this Court did not hold that a state bar was never a "state agency" for state action exemption purposes; it held only that the exemption would not be sustained where the bar was not commanded to take the challenged action, and such action was taken by it for the benefit of its members. In such a case, and only in such case, the bar's status as a state agency for exemption pur-

poses evaporates. In any other factual setting, however, such as one where the bar is "commanded," the *Parker* doctrine applies with full force. Accordingly, the plurality in *Cantor* reached its two-pronged test only after a clear determination that the suit did not "call into question the legality of any act of the State . . . or any of its officials or agents . . . ." 96 S.Ct. at 3117. *Parker*, therefore, was inapplicable and only then was it necessary to further analyze the case to see if any *other* type of exemption or immunity was proper.

Although the dissenting Justices objected strenuously to the plurality's analysis, it is obvious that they would agree that, *at a minimum*, the state action exemption is viable where the civil action challenges the state, state officials or specific action commanded by the state legislature or the state supreme court. The plurality's view, that the exemption is sustained where the state has spoken through one of its constitutionally established supreme bodies, is certainly correct. Each of the three coequal branches should and can be presumed to have no personal interest in its promulgations and to have acted in the best interests of its citizenry. It is only where the challenged action is essentially private, where a private group is "masquerading under the banner of state action," *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363, 370 (9th Cir. 1974), that the federal court need go behind action defended as being that of a state. Even then, it is debatable whether the antitrust laws are the proper route. *Cf. Ferguson v. Skrupa, supra*.

The concurring opinions in *Cantor* are not inconsistent with the arguments presented here. Mr. Chief Justice Burger evinced concern that the challenged program of the utility affected a "separate, competitive" market from that of the regulated market for electricity. 96 S.Ct. at 3124. Given this finding, and that the state's policy is neutral, indeed silent, on the question of whether the light bulb



product market should be regulated, the challenged program was found to have overstepped any directive of the legislature as sovereign. But as noted *supra*, in the instant case, the market is regulated; there is no allegation that it should not be regulated; and the state's policy, with respect to the specific prohibition challenged, is not neutral.

Mr. Justice Blackmun's concurrence is less easy to analyze because through its "rule of reason" rationale, it seems to merge the question of exemption with that of whether, assuming no exemption, a violation of the statute has occurred. Yet the question in every antitrust case is whether or not a restraint is reasonable. See *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918). Although some practices are illegal *per se* because of "their pernicious effect on competition and lack of any redeeming virtue . . .," *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958), this simply means that experience has shown the practice to be unreasonable *per se*. Accordingly, the standard used in determining whether the Sherman Act is violated is always one of reasonableness. One is led to believe, therefore, that perhaps the more traditional *Parker* analysis holds little credence under this concurring opinion. In any event, discussion on this matter is deferred until the immediately succeeding section of this brief, where it is shown that a rule of reason analysis is applicable if the *Parker* doctrine does not prevail.

It is submitted that when the question of exemption is considered in the context of the most relevant cases decided by this Court, *i.e.*, *Parker*, *Goldfarb* and *Cantor*, one realizes that *Goldfarb* and *Cantor* simply are inapposite. The instant case is a *Parker* case. Moreover, reliance on *Schwegmann v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), is misplaced.<sup>6</sup>

<sup>6</sup> Appellants' Brief at 64.

Although it is appealing at first blush to cite *Schwegmann* in support of the proposition that Congress acted specifically where it intended an exemption, *Schwegmann* really stands only for the thesis that when Congress enacted a specific exemption for certain state fair trade programs, it did not intend to exempt non-signer schemes. *Parker*, itself, destroys the interpretation of *Schwegmann* posited by Appellants.

Perhaps the most succinct and concise analysis of the applicability of antitrust law to state action is found in the seminal decision of this Court on the subject. In *Olsen v. Smith*, 195 U.S. 332 (1904), Texas laws regulating pilotage which, in effect, established a monopoly by board regulatees, were attacked, *inter alia*, as being violative of the antitrust laws. This Court, meshing somewhat the concepts of applicability of the law and actual violation thereof, noted that "no monopoly or combination in the legal sense can arise from the fact that . . . agents of the state are alone allowed to perform the duties devolving upon them by law." 195 U.S. at 345. This means that although there may be a combination in the true sense of the word, *i.e.*, some type of collective behavior, there was no intent by Congress that state action undertaken by two or more government officials leads to the identical legal conclusion. Moreover, this Court in *Olsen* recognized that what, in actuality, is a substantive due process question, *i.e.*, whether or not a state regulation is wise or unwise, should not be analyzed in the context of the antitrust laws. To paraphrase the language of the Ninth Circuit in *American Petrofina*, *supra*, the case before this Court is a substantive due process case "masquerading under the banner" of antitrust. Again and again in recent years this Court has advanced its disdain for nullifying state action, even where the Court felt the action econom-



ically unwise. *Ferguson v. Skrupa*, *supra*. Here the Appellants, realizing that a direct attack on such ground would fail, simply attempt to come in the back door.

B. EVEN IF THE PROHIBITION IN QUESTION IS SUBJECT TO THE ANTITRUST LAWS, THE PROHIBITION DOES NOT VIOLATE THE SHERMAN ACT.

If the *Parker* doctrine is applicable, then, of course, this Court's inquiry need go no further. If the state action exemption is not sustained, it then becomes necessary to determine whether the challenged conduct violate the substantive antitrust statutes.

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1969), requires that some type of contract, combination or conspiracy exist before its prohibitions are triggered. In the case at bar, it is difficult to determine who the conspirators are. In *Goldfarb*, the tainted "agreement" was between the Virginia State Bar and the local bar association, membership in the latter being completely voluntary. In contrast, if the combination here is asserted to be between the Supreme Court of Arizona and the State Bar of Arizona or its governing body, no combination can be found for two reasons. First, under the rationale of *Olsen*, *supra*, there is no combination in a legal sense where the purported participants simply are doing what the state as sovereign requires them to do. Second, the rationale of the intra-enterprise conspiracy cases, *e.g.*, *Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) and *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953), are applicable and negate any possibility of a combination where, as here, the bar, an administrative agency of the court, is an

integral part of the judiciary and simply implements court directives.

The same rules of law apply if the combination is asserted to be among the members of the bar's governing body or between the bar and its regulated members. Although at first blush the intra-enterprise conspiracy argument seems to be weakened by cases such as *United States v. National Trailer Rental System, Inc.*, 156 F.Supp. 800 (D. Kan. 1955), *aff'd per curiam*, 355 U.S. 10 (1957), which held that the defense was inapplicable to individuals where their trade association, the vehicle through which they conspired, was not an integration of its members' businesses. However, this rationale would seem to be inapplicable where, as in the instant case, the entity is an integrated bar in which membership is required and the entity's allegedly illegal action is not voluntary, as in the case of a trade association, but is commanded by the state.

Assuming, *arguendo*, that a combination within the meaning of the Sherman Act is found, it then must be determined whether the behavior, itself, unreasonably restrains trade. It is true, as noted in Appellants' Brief at 55, that one court has declared an agreement not to advertise, at least where combined with other collective action, to be *per se* violative of the Sherman Act. *United States v. Gasoline Retailers Association, Inc.*, 285 F.2d 688 (7th Cir. 1961). Moreover, to the extent that Appellants' bald assertion that "[s]tatus as a profession does not authorize substitution of a 'rule of reason' for a *per se* rule,"<sup>7</sup> is deemed to be synonymous with the assertion that there is no blanket "learned professions" exemption from applicability of the antitrust laws, such is true. However, in light of this Court's comments in *Goldfarb*, especially the recognition that "[i]t

<sup>7</sup> Appellants' Brief at 55.

would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas," 421 U.S. at 787 n.17, it cannot be argued that an automatic *per se* standard attaches to the conduct in question here. This statement and the sentence immediately subsequent thereto, which expressly states that differing treatments under the Sherman Act may be necessary, clearly advance some type of reasonableness concept. In fact, this concept of reasonableness was recently applied in *Feminist Women's Health Center, Inc. v. Mohammad*, 415 F.Supp. 1258 (N.D. Fla. 1976). The court there was concerned with a group refusal to deal by physicians, a violation traditionally classified as *per se* unreasonable. Although recognizing the usual applicability of a *per se* rule in the situation presented, the court also recognized that the public was acutely concerned with the standard of medical care it received. A standard of reasonableness was introduced into the case by the court holding that no violation of law by the physicians would be found if

"their action was motivated by a bona fide concern over the existence of satisfactory medical care rather than by concern over the economic impact of competition upon their medical practices. For only if they were motivated by such bona fides can their actions be deemed reasonable under the *per se* doctrine, if plaintiff has established a prima facie *per se* case." 415 F.Supp. at 1263.

Accordingly, if the *Parker* doctrine is inapplicable, if this Court allows the antitrust laws to be used as a vehicle to challenge the wisdom of a state enactment, and if a combination is possible between the entities here involved, the questions reduce to whether or not the prohibition is rea-

sonable. The analysis of Mr. Justice Blackmun, in his concurrence in *Cantor, supra*, would seem to conclude that a rebuttable presumption of reasonableness attaches to state sanctioned activity. *Id.* at 3127. It would be appropriate to require Appellants to prove unreasonableness by "clear and convincing evidence," rather than by a simple preponderance.

Even if, therefore, *Parker v. Brown* is not applicable in this case, a violation of the Sherman Act has not been shown. The challenged activities certainly are not *per se* illegal, and Appellants have not met their burden of persuasion under the rule of reason.

#### CONCLUSION

For the reasons stated herein, the decision of the Supreme Court of Arizona should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Stuart H. Dunn, a member of the Bar of the Supreme Court of the United States and counsel for the *amicus*, hereby certify that I have served three copies of the foregoing Brief by depositing same in the United States Post Office, first class postage prepaid, this 16th day of December, 1976, to William C. Canby, Jr., 413 E. Loyola Drive, Tempe, Arizona 85282 and Melvin L. Wulf, 22 East 40th Street, New York, New York 10016, counsel for appellants, and to Orme Lewis and John P. Frank, 100 West Washington Street, Phoenix, Arizona 85003, counsel for appellee. All parties required to be served have been served.

**STUART H. DUNN**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

Supreme Court, U. S.

**FILED**

1976

MICHAEL RODAK, JR., CLERK

No. 76-316

JOHN R. BATES and VAN O'STEEN,

*Appellants,*

v.

STATE BAR OF ARIZONA,

*Appellee.*

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COLUMBIA, IDAHO STATE BAR, IOWA STATE  
BAR ASSOCIATION, NEW YORK STATE BAR  
ASSOCIATION, STATE BAR OF TEXAS AND WEST  
VIRGINIA BAR ASSOCIATION**

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**INTERESTS OF THE AMICI CURIAE**

These *amici curiae* are state bar associations whose members, for the most part, are practicing lawyers in the several states of Maryland, Alaska, Delaware,

Idaho, Iowa, New York, Texas, West Virginia and the District of Columbia. Each of the *amici*, with the exception of the Bar Association of the District of Columbia, is the largest association of lawyers in those states. Each of the *amici* are devoted to the improvement of the administration of justice, the providing of effective and economical legal services, the protection of the public and the progress and improvement of the legal profession. All of the *amici* are obviously interested in the proper resolution of the very important issues presented to the Court in this case. For these reasons, they have submitted this brief, after having obtained the written consents of the parties thereto which have been filed with the Clerk as required by Rule 42-2.

## INTRODUCTION

A. *Amici's Assumptions Concerning the Nature Of The Legal Profession.* "The attacks . . . are merely an expression of the unrest that seems to wonder vaguely whether law and order pay. When the ignorant are taught to doubt, they do not know what they safely may believe. And it seems to me that at this time we need education in the obvious more than investigation of the obscure." Holmes, *Law and the Court*, in *Collected Legal Papers* (1920), at 291, 292-93. The present brief is tendered in this faith, expressed by a man who, although recognizing "the greedy watch for clients and practice of shopkeepers' arts", still believed that "the law is the calling of thinkers." Holmes, *The Profession of the Law*, in *Collected Legal Papers* (1920), at 29-30. In the same vein, Justice Holmes observed that "one of the good things about the law is that it does not pursue money directly. When you sell goods the price which you get and your interests are

what you think about in the affair. When you try a case you think about the ways to win it and the interests of your client. In the long run this affects one's whole habit of mind, as anyone will notice if he talks much with men." Holmes, *The Bar as a Profession*, in *Collected Legal Papers* (1920), at 153.

The present firestorm of public discussion of lawyer advertising also would have been well understood by Judge Learned Hand:

"The shores are no longer studded with rows of solid columns to break the waves of propaganda; they are not studded with anything whatever, and the waves sweep over them without obstacle and run far up into the land. . . In recent times we have deliberately systematized the production of epidemics in ideas, such as a pathologist experiments with a colony of white mice, who are scarcely less protected. The science of propaganda by no means had its origin in the Great War, but that gave it a greater impetus than ever before. To the advertiser we should look for our best technique. I am told that if I see McCracken's Toothpaste often enough in streetcars, on billboards and in shop windows, it makes no difference how determined I may be not to become one of McCracken's customers, I shall buy McCracken's Toothpaste sooner or later, whether I will or no; it is as inevitable as that I shut my eyes when you strike at my face. In much the same way political ideas are spread, and moral too, or for that matter religious. . . I submit that a community used to be played on in this way, especially one so large and so homogeneous as we have become, is not a favorable soil for liberty. That plant cannot thrive in such a forcing bed; it is slow growing and needs a more equitable climate. It is the product, not of institutions but of a temper, of an attitude towards life; of that mood that looks before and after and pines for



what is not. It is idle to look to laws, or courts, or principalities, or powers to secure it. You may write into your constitutions not 10 but 50 amendments and it shall not help a farthing, for casuistry will undermine it as casuistry should, if it has no stay but law." Learned Hand, *Sources of Tolerance*, in *The Spirit of Liberty* (1960), at 73-75-76.

The instant assault on the traditional restrictions upon lawyer advertising has two branches, that allegedly founded upon the First Amendment, and that founded upon a new interpretation of the antitrust laws. To each of these extravagant claims Judge Hand's description seems fitting:

"In their day they rack the world they infest; men mill about them like a frantic herd: not understanding what their doctrines imply, or whither they lead. To them attach the noblest, and the meanest, motives, indifferent to all but that there is a cause to die for, or to profit by. Such habits are not conducive to the life of reason; that kind of devotion is not the method by which man has raised himself from a savage. Rather by quite another way, by doubt, by trial, by tentative conclusion." *Id.* at 74-5.

If the bar in fact exercises in our society the function of subjecting new suggestions to critical scrutiny in light of past history which De Tocqueville ascribed to it, then it is entirely appropriate that a case involving its practices should provide the occasion for a clear definition of the limits upon the doctrinal developments upon which the appellants here rely. Morality of the mind requires, as Professor Freund has pointed out, recognition of the limitations as well as the potentialities of case authority. Freund, *The Supreme Court of the United States* (Meridian ed.), p. 144 (1961). And it is altogether appropriate that the

organized bar should stand against the tendency described by Justice Schaefer:

"Much more than in the past the lawyer's quest has become a search for quotable words which regardless of their initial context can be read in the abstract to bear upon the situation at hand. The pressure is thus toward a jurisprudence of words or phrases divorced from fact and capable of generating new words and phrases with independent lives." Schaefer, *Book Review*, 84 Harv. L. Rev. 1558 at 1559 (1971).

B. *The Mixed Motives Which Propel Appellants And Their Amici.* The present assault on traditional advertising restrictions appears to proceed from a variety of motives. First, there are the motives of the profiteers alluded to by Judge Hand - those who cluster on any mass movement. The Maryland Bar as well as that of Arizona already offers the courts illuminating examples of these. Those claiming a right to advertise in the Arizona case now before the Court seek the right to advertise their fees for services, such as change of name, which do not require the assistance of a lawyer. Those asserting similar claims in Maryland (the plaintiffs in action styled *Cawley, Schmidt and Sharrow, et al. v. Maryland State Bar Association, Inc., et al.* Civil No. 76-1748, in the United States District Court for the District of Maryland) placed advertisements for business masquerading as advertisements for personnel (Appendix A to this brief). Additionally, by offering their services in workmen's compensation, unemployment and social security matters on a contingent fee basis (Appendix B hereto) the Maryland complainants display the pathology alluded to 40 years ago by the late Karl Llewellyn:

"Solicitation is frequently itself a semi-fraud, as when routine payments already in process for some government office are made to appear needful of expert advice - on contracts for half of the payment as a fee." Llewellyn, *Jurisprudence* (1962), p. 252.

This conduct is, indeed, to quote a dictum of Justice Holmes "fraudulent in itself, and has no merits of its own to commend it to the court."

Second, are the motives of those who desire to substitute more stringent forms of public regulation for what is perceived as the lax discipline imposed by courts and expert professional bodies. Under this category fall Amici, the Consumers Union, and others who, while seeking the right to engage in certain types of publication of self-serving declarations by members of the bar also seek the continuing prohibition of forms of advertising deemed fraudulent, misleading or even unfastidious, and who concurrently demand more stringent regulation of the legal profession by bodies under lay control or with lay representation or by the Federal Trade Commission.

Third, there are the motives of those riding the hobby horses of economic theory, exemplified in this case by the brief of Amici Curiae, The Mountain Plains Congress of Senior Organizations, et al. These groups seek to liberate from present restrictions only those forms of advertising which they deem of economic value, endeavoring to distinguish "informational" from "taste changing" advertising (Brief, pp. 15-16). These groups would support disciplinary rules aimed at "extravagant, artful, self-laudatory brashness... puffery, brashness and artfulness" (*ibid*). Presumably they also support the continued regulation of the content of such objectionable advertising by economic expert bodies, such as the Federal Trade Commission and the antitrust

division, whose officials, unlike those of the courts and bar disciplinary organizations, may possess the desired qualities of economic tunnel vision. Those who support the present assault because of desired economic gains to the groups they represent generally postulate and seek to advance a model of legal services and ethics presupposing that legal tasks are fungible and "uncomplicated" (*id.* at 18).

Finally, there are the motives of those who welcome the lifting of restrictions because of concern with jobs for the practitioners - with multiplying the total demand for legal services, no mind the cost in deteriorating professional conduct, increased social conflict, economic cost to society as a whole, or imposition upon users of such services. This strain likewise is not absent from the published literature. See e.g., Freedman, *Lawyer Ethics and An Adversary System* (1975), p. 115. Wilson, *Madison Avenue, Meet the Bar*, 61 A.B.A. J. 586 (1975).

C. *Consequences For The Public, The Bar and The Court.* Obviously, the aspirations of the various groups contending for change in existing restrictions are inconsistent with, and, to a substantial extent, antagonistic to each other. The Consumer's Union demands a individualized weighing process in which the merits of its proposed legal directories are weighed against the merits of enforcement by the bar of advertising restrictions. This demand rests on the faith that such a process of legislative second guessing by the judiciary will permit Consumer Union legal directories, including self-serving statements by lawyers, to be vindicated while most if not all forms of direct private advertising by legal practitioners continue to be suppressed. It is difficult to believe, given the demands for fastidiousness in advertising put forth by Consumers Union in other contexts, that a collision will not ultimately result



between its preferences and those of groups such as the Messrs. Bates and O'Steen, Cawley, Schmidt and Sharrow and other "legal clinics". The latter groups, with their heavy emphasis on the First Amendment claims, seek a virtually absolute protection for advertising by professionals inconsistent with the preferences of consumer organizations who do not favor interpretations which would virtually repeal not merely existing restrictions on advertising by professionals, but most of the Federal Trade Commission Act as well.

Nor can it be believed that the preferences of the lawyer-appellants will not ultimately collide with those of groups such as the Mountain Plains Congress of Senior Organizations who, mindful of the nation's rich traditions of fraudulent advertising and the teachings of many prominent economists with respect to the contribution of advertising to the suppression rather than promotion of competition, seek the continued vigorous suppression of non-informational advertising, including not merely fraudulent advertising but that deemed 'extravagant, artful, self-laudatory, brash or puffing.' Nor will the preferences of the economists of the Chamberlin-Robinson school and their acolytes remain out of collision with those of the devotees of complete laissez-faire, such as Professor Posner and his disciples, who would liberate all advertising from restriction. Similarly, the groups putting forth claims that lawyers enjoy a virtually absolute First Amendment right to engage in such public verbal communications as they may desire will scarcely enjoy favor either with consumer organizations seeking more stringent regulation of advertising content or with groups relying upon economic theories of imperfect competition with their stress on the goal of separating desirable from undesirable advertising by a process of rigid public control.

Thus, if the present claims of appellants and their supporters in Maryland and other jurisdictions are vindicated, a tower of babel will ensue and a second, third, fourth and fifth generation of cases involving the permissibility of restrictions upon legal advertising will be deposited upon this Court's doorstep. A common attribute of these ensuring generations of cases will be demands that this Court distinguish between advertisements whose content is permissible and advertisements whose content is not permissible, either because they puff, are fraudulent, self-laudatory, tend to the stirring up of litigation, are indecorously expressed or otherwise objectionable.

It is difficult to believe that the end result of recognition of the appellants' claims will not be (1) increased involvement by this Court (as, in effect, a Final Grievance Commission of the American Bar) in the making of distinctions between permissible and impermissible content similar to the detailed involvement which already exists (or until recently existed) in the area of obscenity; (2) a state of continuing confusion in lower courts, among bar disciplinary groups, and in the profession at large; (3) increased vulnerability of lawyers to disciplinary complaints, whether well or ill-founded, in consequence of uncertainty in the rules not now existing; and (4) concomitantly with the first three consequences, a state of almost complete practical laissez-faire in which such restrictions as are permitted to survive in theory will be vitiated in practice, since vague and shifting restrictions will be imposed on an occupational group peculiarly well equipped to perceive and exploit any areas of uncertainty and ambiguity.

These undesirable consequences are neither consistent with nor demanded by either the principles of the First Amendment or those of the antitrust laws.



## SUMMARY OF ARGUMENT

I. Appellants and their supporting *amici* argue that the constitutional test to be applied to restrictions on lawyer advertising is that which is traditionally applied to political speech. This Court, however, has imposed a number of qualifications on the notion that verbal communications must be subject to a "compelling interest" and "overbreath" analysis. One of the most significant of these qualifications was made in *New York Times v. Sullivan*, 376 U.S. 254 (1964). There, the Court appeared to abandon the "two-level" or "non-speech" theories in distinguishing between constitutionally protected verbal communications and those which are not so protected. Consistent recent decisions of the Court have emphasized the proximity of particular forms of speech to the "central meaning" of the First Amendment, *i.e.*, political discourse.

Applying the "central meaning" approach, it is clear that the commercial transactions proposed in appellants' advertisement do not involve participation by individuals in the political process determining the governance of society. There is no support in the case law for appellants' contention that the First Amendment requires that a "strict scrutiny" test be applied to efforts by the state to regulate advertising by lawyers or any other verbal communications by persons with a direct economic interest in the communication.

II. The regulations of Arizona, and of Maryland and of other States, relating to lawyer advertising are not the effusion of private bar associations; they are laws embodied in codes adopted by the highest court of each state in pursuance of its regulatory authority over the legal profession. Such regulations (which, in Maryland, are enforced by a purely public body, The Attorney Grievance Commission), fall clearly within the

state action exemption from the coverage of the Sherman Act. *Parker v. Brown*, 317 U.S. 341, 350 (1943).

Although the United States, speaking through the Solicitor General, has conceded the inapplicability of the antitrust laws to the Arizona disciplinary canon against lawyer advertising, appellants nevertheless confidently assert that not only are the antitrust laws applicable, but also that the prohibitions against commercial advertising by lawyers represent a *per se* violation of the Sherman Act. That proposition is erroneous. *State of Arizona v. Cook Paint & Varnish Co.*, 391 F. Supp. 962 (D.Ariz. 1975). The origins of the prohibitions against lawyer advertising show convincingly that their purpose was not to enhance the cost of legal service. Rather, these rules arose out of a necessity to protect the public against the solicitation of litigation, extravagant and misleading claims of legal ability and success in representing clients, and abuse and misconduct by some lawyers. The rules against lawyer advertising thus are not based on a particular prejudice against private advertising; they are founded upon a central ethical insight, *i.e.*, that the maintenance of a sound professional relationship demands that the representation should be one initiated by the client and not by the lawyer.

This traditional model of the professional relationship which the Code of Professional Responsibility attempts to enforce is totally at variance with the view of that relationship which is implied by the actions of the appellants and several of their supporting *amici*. That view holds that professional services may be equated (or nearly so) with fungible goods. Only a model of the lawyer's function which conceives of him not as a professional but as a scribe can justify the practices of the appellants proclaimed in their advertisement and condemned by the Supreme Court of Arizona.

Although the appellants may be able to cite some experts who hold that the elimination of all advertising restrictions will serve consumer interests, Posner, *Economic Analysis of Law* (1974), this insight is challenged by many others in the field. The expensive, anti-competitive effects of advertising are reasonably well known, as the Federal Trade Commission can attest, both in deed and word. Before this Court as exhibits in the record of the Arizona case and as appendices to this brief, are fragmentary harbingers of the future of lawyer advertising, if it is to be permitted. These documents, written while their authors have every reason to be on their best behavior, amply suggest the undermining of ethical percepts which will ensue if legal advertising is permitted.

III. The First Amendment claims asserted by the appellants and their supporting *amici* are founded on no tenable political theory and would have disastrous consequences for virtually all forms of public regulation if taken seriously. The antitrust claims can be sustained only by embracing interpretations of law equally antagonistic to federalism, to First Amendment rights, and to sound economic judgment.

The organized bar does not contend that the existing disciplinary rules are immutable. However, to the extent that they operate to discourage resort to law except by those determined to invoke its processes, their postulate is rational and compelling. Meanwhile, change in those rules should best await their consideration by the legislatures and the state courts with authority over them after full and free discussion.

## ARGUMENT

### I.

#### THE FIRST AMENDMENT DOES NOT DEMAND THE INVALIDATION OF RESTRICTIONS ON ADVERTISING BY LAWYERS

##### A. The Constitutional Theories Of The Appellants And Their Amici.

The test that the appellants urge upon the Court for the validity of lawyer-advertising restrictions is that conventionally applicable to political speech, *i.e.*, "the constraint must be necessary to the furtherance of a compelling state interest . . . in addition the state must show that the restriction of speech is drawn as narrowly as possible and that no less restrictive means of regulation will suffice" (Brief of Appellants, p. 40). With respect to fraudulent and misleading advertising, appellants' brief suggests that the only prior restraints that may be suitable are restrictions upon time, place and manner "to prevent hand billing to persons under unusual physical or mental stress, as at the scene of accidents or in hospital emergency rooms" (*id.* at 53). Misleading advertising outside this narrow category is, say the appellants, "best handled by a requirement of additional disclosure," and the Court is urged to prevent states from following "the contrary path of shutting off the flow of information" (*id.* at 54), even in the case of fraudulent and misleading advertising. This position is pressed, even though the appellants also urge the Court to strike existing state court enforced restrictions on the basis that false advertising by lawyers will continue to be prohibited by state consumer



protection agencies and by the Federal Trade Commission Act (*id.* at 46). Nevertheless, under the view elsewhere urged in their brief, appellants contend that the Federal Trade Commission will presumably be disentitled to seek, outside the "emergency room" context, injunctions which would "shut off the flow of information" as distinct from imposing requirements of additional disclosure (*id.* at 54).

The constitutional claims asserted by the appellants are also urged, albeit in somewhat less sweeping form, by the Brief Amici Curiae of the Chicago Council of Lawyers. On the one hand, that particular group urges that the 'compelling state interest' test as well as restrictions on 'overbroad legislation' ought to be applicable to limitations on lawyer advertising (Amici Brief, pp. 7-8). On the other hand, the Council claims that its own proposed rule can withstand the constitutional scrutiny which it urges, notwithstanding that the proposal set out at page A-2 of its brief would preclude lawyers from making truthful statements "containing any statement of the results of any prior or pending legal proceeding or proceedings."

The Brief Amici Curiae of Consumer's Union et al while embracing the same 'compelling interest' rhetoric as the Brief of Appellants and that of the Chicago Council of Lawyers, lays more stress on a rhetoric of "balancing", presumably with an eye to the future, in which consumer groups may be expected to demand restrictions on abuses in advertising carried on by persons other than themselves (p. 7).

The Brief Amici Curiae filed on behalf of the Mountain Plains Congress of Senior Organizations and other "consumer groups" totally avoids any discussion of the First Amendment issue, probably because of justifiable terror at its implications for consumer protection. Instead, that brief urges the Court to

manipulate the antitrust laws so as to strike only restrictions upon that advertising which certain favored economists certify as being desirable.

### **B. Qualifications On The Sweep Of The First Amendment Imposed By This Court.**

Other than incantation of catch words about compelling interest and over-breadth, appellants offer the Court no theory of the First Amendment which would bring within its terms the result which they seek. The beginnings of wisdom in this sphere are found, amici believe, in a recognition of the fact that all human conduct and all social organizations involve, in one way or another, verbal communication. It does not follow from this fact that all limitations upon human conduct or social organization are appropriately measured by a compelling interest-overbreadth test. Were this the case the function of legislatures or bodies exercising authority delegated by legislatures would disappear. All effective political power would be reposed in courts of last resort which would be engaged in this and all other social and economic contexts in carrying on the sort of peculiarly legislative inquiry urged upon this Court in the Brief Amici Curiae of Consumers Union, et al:

"Consideration of the numerous 'factors' bearing on whether Arizona's ban on the advertisement published by appellants can meet the rigorous constitutional tests...inter alia, the following factors: what public interest if any are the disciplinary rules in fact designed to serve; whether that rule achieves or facilitates those purposes; the extent of consumer ignorance about the cost and availability of such services; whether potential consumers of legal services have a greater need for



information about such services than they do for other kind of services and products; the effect of the rule upon the cost and availability of legal services and upon consumer ignorance about same; the effect of the rule upon competition among lawyers; the extent to which the cost and availability of legal services can be advertised in a manner that is neither false nor misleading; whether those particular legal services advertised by appellants are relatively standardized; the extent to which the rule itself facilitates deception of and confusion among potential consumers of legal services; whether a less restrictive limitation on advertising of the cost and availability of legal services could achieve the purposes which the rule purports to serve; whether the rule is necessary to prevent false or misleading advertising of legal services and deceptive practices by lawyers; whether the enforceability of other prohibitions against false or misleading advertising or other deceptive practices by lawyers would in fact be increased by the publication of some of the terms on which certain legal services are offered; whether advertising of the cost and availability of certain legal services are misleading simply because it contains some but not all of the information that a potential consumer of such services might wish to have; the extent to which other sources of information about the cost of availability of legal services are available to ordinary consumers and the cost of utilizing such sources; the extent to which efforts by the organized bar to dispel consumer ignorance about the cost of availability of legal services have been unsuccessful; and the extent to which the legal profession itself believes that the advertising ban is excessively successively broad." (Amici Brief of Consumer's Union, pp. 15-16).

Too plainly for fair argument, such an exhaustive and complex constitutional test cannot be applied to every public regulation that implicates verbal conduct. As this Court recognized in *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935), effectuation of any policy generally demands, in its administration, the adoption of certain *per se* rules whose application is in no way dependent upon the carrying out of a quasi-legislative balancing process in each case. The formulation of such rules is of the essence of legislation, whether the legislative process is carried out by an elected body, or by a court in construing legislation, as by devising *per se* rules in the context of the antitrust laws. Any verbal understanding, including any horizontal price fixing agreement condemned by the Sherman Act, involves verbal communication. Nevertheless, few would contend that the Supreme Court's rejection of the "rule of reason" in the context of horizontal price fixing and other condemned practices alluded to in the brief of Amici Curiae Mountain Plains Congress of Senior Organizations, et al, is on that account unconstitutional.

Clearly, for such rules to exist, in antitrust or in any other area of the law, the notion that all verbal communication is subject to a "compelling interest" and overbreadth task must be qualified. It is not necessary to rehearse the history of First Amendment theory in this Court to indicate that this Court has in fact made such qualifications. Some of the qualifications have been achieved by characterizing various verbal activities as "conduct" rather than speech, or as "speech plus". Other qualifications arise by efforts to segregate regulations of time, place and manner, such as those at issue here, from regulations of the substance of communications. Still other qualifications arise from

efforts on the part of this Court to identify the central meaning and purpose of the First Amendment. Certainly, the last of these strains provides the unifying principle with respect to most of this Court's recent decisions involving the scope of the First Amendment. Its decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), appeared to many commentators to constitute a partial abandonment of efforts to segregate protected from non-protected verbal communication on the basis that non-protected communication was "not speech", and to replace that essentially fictitious formulation with new doctrine, founded upon the proximity of particular forms of speech to the central purpose of the First Amendment. This abandonment of the earlier "two level" or "non-speech" theory of course explains the recent repudiation of this Court's old decision in *Valentine v. Christiansen*, 316 U.S. 52 (1942), holding commercial advertising totally unprotected, which was worked by its opinions in *Bigelow v. Virginia*, 421 U.S. 809 (1975), and *Virginia State Board of Pharmacy v. Virginia Citizens' Consumers Council*, — U.S. —, 96 S. Ct. 1817 (1976).

In *New York Times v. Sullivan*, in invalidating restrictions on libel of public officials previously not regarded as involving "speech" enjoying constitutional protection, the Court stressed the relation of such political speech pertaining to the conduct of public officials to "the central meaning of the First Amendment", 376 U.S., at 273 (1964). The late Professor Harry Kalven, Jr. wrote of this opinion:

"What criterion, we may ask, tells the Court that the Alabama libel law is unconstitutional under the first amendment? In many ways, the most unusual thing about the majority opinion of Justice Brennan is that it reads as though we are starting all over again to build a free speech doctrine

afresh. There is not a word of clear and present danger or of balancing. The key source of insight for the court, following closely the very able brief for the defendants on which Professor Wechsler participated, comes from seditious libel — or rather from what one might better call the negative radiations from seditious libel. Neither factual error nor defamatory contents serve, we are told, 'to remove the constitutional shield from criticism of official conduct.' Then follows a profound and welcome sentence, lifted literally from the Wechsler brief: 'this is the lesson to be drawn from the great controversy over the sedition act of 1798, which first crystallized the national awareness of the central meaning of the first amendment.' . . . One is tempted to observe that the very curious facts of the *Times* case forced the court back to the discovery of a basic truth about the First Amendment, namely that the core of its constitutional protection must be to guard against treating seditious libel as an offense and that we are now to work out toward a more complete theory from there. While the opinion is devoted primarily to the problem before it — that of criticism of public official — there are strong suggestions in it of an extremely broad and generous view which is highly reminiscent of the position of Alexander Meikeljohn." Kalven, *The Negro and the First Amendment* (1963), at 57, 59).

Mr. Justice Brennan, the author of the opinion of the Supreme Court in *New York Times v. Sullivan*, himself has acknowledged indebtedness to Professor Meikeljohn's formulation, see Brennan, *The Supreme Court and the Meikeljohn Interpretation of the First Amendment*, 75 Harv. L. Rev. 1 (1965). It is true that there are recent indications that even in areas touching at the core of the First Amendment, as defined by the



Meikeljohn theory, the Court will employ a "balancing" approach, albeit one weighted with a presumption, rather than one of "strict scrutiny". *Nebraska Press Association v. Stuart*, — U.S. —, 96 S. Ct. at 2801-04, 2807-08 (1976) (per Burger, CJ and White, Blackmun, Powell and Rehnquist, JJ). Nevertheless, all of this Court's recent opinions, including that one, have stressed the relevance of the Meikeljohn conception to the extent of the Court's scrutiny of the challenged regulation of verbal conduct. Thus, in *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) the Court stressed the special function of the First Amendment in promoting democracy by protecting political discourse. This reference in *Buckley v. Valeo* came in the context of a holding invalidating certain restrictions upon political discourse. Cases upholding challenged restrictions upon verbal communications imply a similar test. Thus, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the more limited relevance of the First Amendment to libel of private individuals was emphasized. In *Ginsberg v. New York*, 390 U.S. 699 (1969), the First Amendment was held to afford more limited protection to restrictions on the distribution of speech to minors, who are not participants in the political process. In *Lehman v. Shaker Heights*, 418 U.S. 298 (1974), it was pointed out that speech directed at unwilling listeners who were assumed not to be likely to be influenced by it in their political choices enjoys less First Amendment protection. In *Brigham Young v. American Mini Theatres, Inc.*, — U.S. — 96 S. Ct. 40 (1976), four members of the Court, Chief Justice Burger and Justices Stevens, Rehnquist and White, held that sexually explicit speech, even that non-obscene under conventional tests, enjoys less protection against regulation than political speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,

*supra*, this Court was explicit in its recognition that commercial speech did not enjoy the intense First Amendment protection accorded political speech. *Garrison v. Louisiana*, 379 U.S. 694, 74-5 (1964), in which this Court declined to give First Amendment protection to knowingly false speech because of its lack of relation to the democratic political process, and *Miller v. California*, 413 U.S. 15 (1973), in which this Court upheld local variations in the rules governing obscenity in part on the basis that such rules were not central to preservation of the political process, also provide illustrations of the same approach. Other references to political expression as lying at the core of the First Amendment are found in *Monitor Patriot Company v. Roy*, 401 U.S. 265, 271-72 (1971), *Stromberg v. California*, 283 U.S. 359, 369-70 (1931) and *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). The traditional exclusion of the military from active participation in the political process in a democratic state was advanced as a justification for the result reached by the Court in *Greer v. Spock*, — U.S. —, 96 S. Ct. 1211 (1976). Similar reasoning relating to the participation of government employees in the political process was advanced in *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973). On similar grounds, the Court has held that illegal speech does not enjoy constitutional protection against prior restraints. *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1963). In light of this line of cases, it is worth noting exactly what Professor Meikeljohn said concerning the appropriate contours of constitutional protection of free speech:

"The preceding section may be summed up thus: the First Amendment does not protect a 'freedom to speak.' It protects the freedom of those



activities of thought and communication by which we 'govern.' It is concerned, not with a private right, but with a public power, a governmental responsibility . . ." (Meikeljohn, *The First Amendment is an Absolute*, 1961 Supreme Court Review at 255).

"We recognize that there are many forms of communication which, since they are not being used as activities of governing, are wholly outside the scope of the First Amendment. Mr. Justice Holmes has told us about these, giving such vivid illustrations as 'persuasion to murder' and 'falsely shouting fire in a theatre and causing a panic.' And Mr. Justice Harlan, referring to Holmes and following his lead, gave a more extensive list: (366 U.S. at 49 n.10) 'libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy . . ." (at 258).

The changes of names, declarations of personal bankruptcy, and divorces that are the subject of the instant case involve, by no stretch of the imagination, "activities of governing." Cf. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 509, 513-514 (1972). They do not involve entry into the public forum to debate the wise governance of society. They involve private interests — indeed frequently the most imaginably selfish private interests. The cases, such as *NAACP v. Button*, 371 U.S. 415 (1963), and the labor union cases involving the rights of persons who have voluntarily associated for political purposes<sup>1</sup>, are of no help to appellants here. The commercial transactions proposed by the advertisement condemned by the Arizona State Bar in its enforcement of the Arizona

<sup>1</sup> *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar*, 389 U.S. 217 (1967).

Supreme Court rules in no sense involve participation by individuals in the political process determining the governance of society.

No tenable theory of free speech consistent with what the Court has recently said can so stretch the protection of the First Amendment as to impose upon state restrictions of advertising by lawyers the "strict scrutiny" or "over-breadth" tests urged by appellants here. The lame effort of appellants, in §1A3 of their brief (pp. 37-40), to urge that some sort of special First Amendment interest attaches to the advertising of legal services because the recipients of advertising have a constitutional right to use such services is of a piece with the efforts made in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), and *Dandridge v. Williams*, 397 U.S. 471 (1970), to bring other economic interests under the rubric of "strict scrutiny" First Amendment protection. In *Rodriguez*, it was earnestly urged that the undoubted First Amendment protection enjoyed by education required that measures relating to its finance meet a strict scrutiny test. In *Dandridge*, this Court was told that the ability of welfare recipients to exercise First Amendment rights would be gravely impaired if minimum subsistence was not assured them. In each instance, this Court held that the connection with First Amendment rights of political speech was too remote to justify removing from state courts and legislatures large portions of their responsibilities for regulation of economic and social conduct. The present claim of special First Amendment protection is no less strained.

First Amendment claims might indeed protect economically disinterested private organization, such as Consumers Union in their publication of information derived from clients about charges of particular lawyers in their vicinity or their performance, as distinct from

the self-serving declarations of economically interested lawyers. The case law, however, offers no support for the notion that the First Amendment demands that the 'strict scrutiny' test be applied to efforts by the state to regulate advertising or other verbal communications by persons with a direct economic interest. This insight is not peculiar to Professor Meiklejohn and those influenced by his formulations. Professor Emerson, in his effort to define a general theory of the First Amendment, has defined "the purpose of a system of freedom of expression — to allow individuals to realize their potentialities and to facilitate social change through reason and agreement rather than force and violence." Emerson, *The System of Freedom of Expression* (1970), p. 432. His definition excludes from 'strict scrutiny' regulation of activities which "fall within the system of commercial enterprise and are outside the system of freedom of expression" (*id.* at 311). These include advertising and other communications "carried on by a business enterprise and directed against another business enterprise" (*id.* at 447), a category which would seem to include lawyer advertising of fees and qualifications of the type engaged in by the Messrs. Bates and O'Steen and at issue in this case. Professor Emerson's treatise also points out wide areas of the law in which restrictions on verbal communication would be difficult to explain but for the existence of attenuated standards of First Amendment protection relating to commercial speech. These include the prohibitions of corporate political contributions in 18 U.S.C. §160 (*id.* at 640); the recognition of a right of privacy against commercial appropriation of one's name or likeness adverted to and approved in *Time Inc. v. Hill*, 385 U.S. 374, 381 (1967) (*id.* at 548-49, 561); the prohibition of promises of benefit in labor representation elections imposed by

29 U.S.C. §158(c) (*id.* at 424 n. 17) and, of course, the Federal Trade Commission's powers to restrain false advertising upon a showing of probable violation; see *E.F. Drew v. Federal Trade Commission*, 235 F.2d 735, 739 (2d Cir. 1956), *cert. den.*, 352 U.S. 969; *National Commission on Egg Nutrition v. F.T.C.*, 517 F.2d 485 (7th Cir. 1975), *cert. den.*, \_\_\_ U.S. \_\_\_ (1976). (*Id.* at 417 n. 6). See also the prohibitions sustained in *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 584 (D. D.C. 1971), *affd.*, 405 U.S. 1600 (1972) ("product advertising is less vigorously protected than other forms of speech"); in *Rowan v. United States Post Office*, 300 F. Supp. 1036 C.D. Cal. 1969), *affd.*, 397 U.S. 728 (1970) ("The commercial element does not altogether destroy its quality as protected speech, but it does substantially reduce the weight of the expression on constitutional scales"); and in *Barrick Realty Inc. v. City of Gary*, 491 F.2d 161 (7th Cir. 1974) ("the posting of 'For Sale' signs by private homeowners is commercial in character and therefore subject to regulation").

The appropriateness of a concept of the First Amendment focusing upon the relation of speech claimed to be protected to the maintenance of the political process is manifest. Such an emphasis preserves the central concept of free political speech and freedom of political revision, at the same time preserving in some measure the insulation of this Court and of the National Government from moral and social controversies of the sort that have traditionally been fought out at the State level. Such a division of responsibility provides for many observers the explanation for the stability of American government:

"Other[s] . . . advocated the so-called 'presidential system' on the American pattern . . . Executive and legislative would thus go through the whole



duration of their respective mandates without either of them ever being able to coerce the other... [The United States] is a federation of states each of which, with its governor, its representatives, its judges, and its officials — all elected — takes upon itself responsibility for a large part of the immediate business of politics, administration, justice, public order, economy, health, education, etc. while the central government and Congress normally confine themselves to larger matters: foreign policy, civic rights and duties, defense, currency, overall taxes and tariffs. For these reasons the system has succeeded in functioning up to now in the north of the New World. But where would it lead France... a country the demands of whose unity coupled with the perpetual threats from outside have induced to centralize its administration to the utmost, thus making it *ipso facto* the target of every grievance?... The inevitable result would be either the submission of the President to the demands of the deputies or else a pronunciamento." DeGaulle, *Memoirs of Hope, Renewal and Endeavor* (1971), pp. 323-324.

## II.

### THE CHALLENGED REGULATIONS DO NOT CONTRAVENE THE ANTITRUST LAWS.

#### A. The Challenged Rule Is State Action.

The regulations of Arizona, Maryland and other States relating to lawyer advertising are not the effusions of private bar associations but are laws embodied in codes adopted by the highest court of each state in pursuant of its regulatory authority over

the legal profession. *Parker v. Brown*, 317 U.S. 341, 350 (1943) is controlling here. The action of state supreme courts in adopting the Code of Professional Responsibility is not a perfunctory action. The Supreme Court of California, for example, has declined to adopt the ABA sponsored code; the Arizona court modified it; the Maryland court has not yet adopted the most recent amendments to it. The Maryland Court of Appeals, which adopted the Code by adoption of Maryland Rule 1230 did so by the process of static rather than dynamic conformity. Thus, subsequent amendments to the Code will require amendment by that Court to the original text of the code which is set out as Appendix F to the Maryland Rules and Procedure. Enforcement of the Code in Maryland is reposed in the hands of the Attorney Grievance Commission, a purely public body, the prior role of bar associations in enforcement having been eliminated in 1975. See Comment, *Discipline Of Attorneys In Maryland*, 35 Md. L. Rev. 236 (1975).

The appellants and their friends are not of one mind with respect to the proposition that the antitrust laws preclude state enforcement of restrictions on attorney advertising. The United States, through the Solicitor General, has conceded the non-applicability of the antitrust laws to the Arizona rule against lawyer advertising (Brief, pp. 19-21). Next, the Amici brief of Consumers Union, et al., betraying as it does a purpose of preserve at least some of the existing state restrictions against the crasser forms of private advertising while freeing from such restrictions the publications of Consumers Unions, Public Citizen, and other 'right minded' persons, carefully refrains from tendering the antitrust-preemption argument. The brief Amici Curiae of the Chicago Council of Lawyers, desiring as it does to substitute for the existing restrictions promulgated by the Illinois Supreme Court a new set of detailed restrictions promulgated by the



Chicago Council of Lawyers set out at pages A1 and A2 of its brief, likewise shies away from the antitrust-preemption arguments:

"The Council takes no position on the question of whether a voluntary agreement by lawyers to restrict their own advertising (whether embodied in the ethical canons of a Bar Association or otherwise) is in violation of federal antitrust laws" (Brief, p. 1).

The Brief of the Appellants, economically interested lawyers, by contrast would invalidate virtually all state economic regulations not only of the bar but of all businesses and professions. Two tests are urged. First, it is said that state regulations of communication are stripped of their exemption where they are lobbied for by private interests:

"It is not unfair to hold private parties responsible under the antitrust laws, when as here, they have exercised a considerable degree of freedom of choice in initiating the restraint." (Appellant's Brief, p. 64).

Only those state economic policies which originate in the bosom of the state bureaucracy are, under this view, entitled to immunity.

However, a second even more sweeping proposition is urged at page 70 of the Appellant's Brief. It is said that the "strong national policy of the antitrust laws" ought not to be automatically frustrated by the "simple election of a state to dictate the operation of an industry along non-competitive lines contrary to the free enterprise model protected by the Federal statute." Under this view, even state regulations that are, in the appellants' eyes, brought by the stork, (that is, originated by the state bureaucracy and not urged by private persons or interests) would be subject to Sherman Act condemnation. This view of the Sherman

Act would compel the states to structure their apparatus of economic regulation in accordance with the views of the Manchester school unless Congress has expressly authorized them to do otherwise: "Congress, after all, is entitled to repeal the Sherman Act and the States are not." (*Id.* at 71).

The difficulties with the first proposition are obvious. It is flatly inconsistent with the First Amendment rights which appellants elsewhere in their brief profess to espouse, and not merely the periphery of First Amendment rights but with their central core, as defined by the Supreme Court in *New York Times* and other cases and by Professor Meiklejohn, Emerson, and others in their writings. Mr. Justice Black speaking for this Court recognized this in the *Noerr* case.<sup>2</sup> Legislation is not to be condemned because interests to be benefitted by it and not the bureaucracy have urged it. Nor is the price for successful advocacy of legislation to be criminal punishment, treble damage penalties, or disentitlement to the benefits conferred by it. The view espoused by appellants would strip constitutional guarantees of free expression on political and economic issues of meaning. Labor unions, association of agricultural workers, farmers and professionals urging regulatory schemes deviating in any way from a presupposed national economic policy would, if their legislative efforts at the state level were crowned with success, be met with the argument that the resulting state legislation either was preempted by the Sherman Act or is a detriment to them, since "it is not unfair to hold private parties responsible under the antitrust laws when . . . they have exercised a considerable degree of freedom of choice in initiating the [state government] restraint." (Appellants' Brief, p. 64).

<sup>2</sup> *Eastern Railroad Presidents Conference, et al. v. Noerr Motor Freight, et al.*, 365 U.S. 127 (1961).

The difficulty with the second even more sweeping proposition urged by the appellants is that there is no evidence that the Sherman Act was intended as a declaration of a "strong national policy" which would preempt state regulations not constructed in accordance with its economic premises. Available evidence concerning the intended scope of the Sherman Act contains no indication that it was designed to preempt state administered regulatory schemes. On the contrary, the available evidence indicates otherwise. It suggests, as this Court's recent opinions on the related issue of primary jurisdiction have recognized,<sup>3</sup> that the Sherman Act was intended to have a residual function and to operate where more direct systems of state or federal regulation have not been erected.

"From the retrospect of the 1950's, the Sherman Act of 1890 looks as if it must have been a turning point of great moment in nineteenth century policy. But there was a curiously tepid quality to this declaration, as it occurred; the Sherman Act has more importance to us than it seems to have had to its contemporaries. It was only in our century that executive initiative and judicial inventiveness gave body and thrust to the federal government's responsibility for maintaining the market as an institution. The presidential messages warned that the 'trusts' were a threat, but no real presidential pressure lay back of the Sherman Act. There is no evidence that antitrust planks in the major party platforms of the time responded to ardent opinion; there was no contemporary flood of petitions, no popular lobby

<sup>3</sup> Considerations of Federalism make a finding that antitrust laws control less appropriate where a state regulatory scheme is at issue. See *The Supreme Court*, 1975 Term, 90 Harv. L. Rev. 56, 234 n.37 (1975), and the works there cited.

for a federal antitrust statute, and the current newspapers paid little attention to the congressional maneuvers and debates out of which the act emerged. Most of the congressional discussion dealt with other and more specific bills than that which passed; indeed, apart from providing a useful token of concern for the farmers, lest industry abuse the price relief which the protective tariff gave it, the practical occasion for the Sherman Act may have been largely that its generalities relieved congressmen of the embarrassments of more specific proposals pressed on them." Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (1964), pp. 91-92.

Legislative intention is relevant to determining the intended sweep of the Sherman Act, which is not a part of the Constitution. As Professor Frankfurter (as he then was) pointed out many years ago, the framers of the Constitution expressly declined to insert in it an antimonopoly clause which would have interdicted state regulations in conflict with a particular economic theory. See F. Frankfurter, *The Commerce Clause Under Marshall, Taney, and Waite*, 42-13 (1937); *American Federation of Labor v. American Sash and Door Co.*, 335 U.S. 538, 543 n.1 (1949) (Frankfurter, J., concurring), and the works there cited. This is not the first time that an effort has been made to invoke clauses of the Federal Constitution or legislation passed under them against state regulation departing from a particular approved set of economic teachings. However, history has vindicated those justices who announced the hitherto prevailing rule rejecting such attempts to deprive the states of authority to enact social and economic legislation in disputed areas of public policy. See the *Slaughter House Cases*, 83 U.S. 36 (1873); *Butchers Union Company v. Crescent City Co.*, 111 U.S. 746 (1884); Fairman, *Mr. Justice Miller and the Supreme Court*, Chapter 8 (1939).



### B. No Unreasonable Restraint Of Trade Is Present.

Appellants and some of their *amici* have confidently asserted that a *per se* rule exists under the Sherman Act against combinations or agreements to suppress advertising. In fact, however, no such rule exists. The careful discussion by Judge Renfrew in *State of Arizona v. Cook Paint & Varnish Co.*, 391 F. Supp. 963 (D. Ariz. 1975) demonstrates the fallacy of such a proposition. Judge Renfrew there observed:

"Although Plaintiffs have cited several cases which they believe support their constructive price fixing theory, an analysis of the facts in those cases reveals that they are inapposite to the situation presented here. In each case an actual, as opposed to constructive purpose of the conspiracy was to affect prices, though the means used to accomplish this objective were varied, and in some cases, indirect. The five price fixing cases cited by plaintiffs are *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1939); *National Macaroni Manufacturers Association v. FTC*, 345 F.2d 421 (7th Cir. 1965); *United States v. FTC*, 345 F.2d 421 (7th Cir. 1965); *United States v. Gasoline Retailers Association Inc.*, 285 F.2d 688 (7th Cir. 1961); and *Plymouth Dealers Association of Northern California v. United States*, 279 F.2d 128 (9th Cir. 1960). [In] *United States v. Socony Vacuum Oil Co.*... The Court found that the buying programs 'had as their direct purpose an aim the raising and maintenance of spot market prices and of prices to jobbers and consumers in the mid-western area.' 310 U.S. at 216... In *National Macaroni Manufacturers Association v. FTC*... the Federal Trade Commission found that 'the agreement was intended to ward off price competition for durham wheat in short supply by

lowering total industry demand to the level of the available supply.' 345 F.2d at 246... In *United States v. Gasoline Retailers Association, Inc.*, the alleged violation of §1 of the Sherman Act was a continuing agreement among defendants to refrain from price advertising... The Court found that 'the basic object of defendants' conspiracy was the stabilization of retail gasoline prices,' 285 F.2d at 691, and affirmed the defendants' conviction. *Plymouth Dealers Association of Northern California v. United States* involved the preparation and distribution of a fixed uniform list price by dealers marketing a particular brand of automobile for use in making pricing decisions... Each of these cases contains a common element: In sustaining a finding of price fixing conspiracy, the Court found that an actual, conscious purpose of the conspiracy was to affect price in some manner. As such, they simply do not furnish support for plaintiffs' constructive purpose theory... The range of collaborative conduct, the natural and probable consequence of which might be said to be an effect of some type on the price at which goods are sold, and thus the range of conduct embraced by such a doctrine, is almost limitless. Following the logic of Plaintiffs' theory to its inexorable conclusion, all such conduct would be *per se* violative of §1 of the Sherman Act. Such a result manifestly would be inconsistent with the justification for *per se* rules under §1. The Supreme Court has explained it thusly: 'there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5. With respect to the application of this



standard the Supreme Court has noted that 'it is only after considerable experience with certain business relationships that the courts classify them as *per se* violations of the Sherman Act,' *United States v. Topco Associates*, 405 U.S. 596, 607-608 (1972)... By contrast, Courts do not have similar experience in dealing with the myriad types of relationships, business and otherwise, the natural and probable consequence of which may be to affect prices in some manner. Indeed many such relationships could not be deemed restraints of trade, let alone unreasonable restraints of trade, within the purview of the Sherman Act. *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) provides an excellent example of this point... the Court need not belabor this point further. It does not require a particularly fertile imagination to realize the potentially limitless scope, and therefore inappropriateness, of a constructive price fixing doctrine... Finally, strong policy considerations militate in favor of this result... A large area of state law would be subsumed under the Federal Antitrust Laws. The Supreme Court has indicated that this is an important consideration in determining the coverage of the Sherman Act: 'the maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far reaching importance. An intention to disturb the balance is not lightly to be imputed to congress.' *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940)."

391 F. Supp. at 966 n.2, 967 n.3 and 970.

It cannot be successfully maintained that the purpose of the restriction on all advertising, and not specifically price advertising, imposed by the Code of Professional Responsibility, or the Canons of Ethics before, was the enhancement of the cost of legal services. There is no

mystery about the origins of the restrictions on advertising. They are recounted at length in Drinker, *Legal Ethics* (1953), pp. 210-215, and in Ethical Consideration 2-9 of the Code of Professional Responsibility, at footnote 24:

"The prohibition of advertising by lawyers deserves some examination. All agree that advertising by an individual lawyer will detract from the dignity of the profession, but the matter goes deeper than this. Perhaps the most understandable and acceptable additional reasons we have found are stated by one commentator as follows:

1. That advertisements, unless kept within narrow limits, like any other form of solicitation, tend to stir up litigation, and such tendency is against the public interest.

2. That if there were no restrictions on advertisements the least capable and least honorable lawyers would be apt to publish the most extravagant and alluring material about themselves, and that the harm which would result would in large measure fall on the ignorant and on those least able to afford it.

3. That the temptation would be strong to hold out as inducements for employment assurances of success or of satisfaction to the client, which assurances could not be realized, and that the giving of such assurances would materially increase the temptation to use ill means to secure the end desired by the client. In other words, the reasons for the rule, and for the conclusion that it is desirable to prohibit advertising entirely or to limit it within such narrow bounds that it will not admit of abuse, are based upon the possibility and probability that this means of publicity, if permitted, will be abused."

To this, Drinker adds the observation, of unique pertinence to the legal profession: "lawyers . . . differ radically from the milk man, the liquor dealer or the manufacturer of cigarettes in being yesterday an antagonist and today a colleague on the same side of the counsel table." (p. 211). A profession, many of whose functions involve disputation and whose ethical code is necessarily importantly devoted to avoidance of friction among counsel resulting therefrom, necessarily must hesitate before adding to the opportunities for friction the additional tensions which attend direct commercial promotion. Society, which relies on lawyers for the peaceful settlement of disputes and not the multiplication of social conflict, has a similar interest. Clearly, none of the purposes of the rule against lawyer advertising as expressed in a voluminous literature is in any way directed toward enhancing the cost of legal services or otherwise affecting their price. Thus, as Judge Renfrew convincingly demonstrated in a similar context, existing advertising restrictions cannot be deemed *per se* violations of the antitrust laws.

It is worth noting that the state courts need not repair to the bar's own literature to describe or to justify the origin or purpose of their restrictions on lawyer advertising. Students of jurisprudence of unimpeachable disinterestedness have similarly described the function of these rules. The late Julius Henry Cohen, for example, in a passage quoted at page 212 note 10 of Drinker on **Legal Ethics** has noted, as the justification for the advertising restriction:

"The basis of the relationship between lawyer and client is one of unselfish devotion, of disinterested loyalty to the client's interest, above and beyond his own. Let the lawyer seek you for his own profit and you despise him" Cohen, *The Law, A Business or Profession* (1916), p. 197.

The late Professor Karl Llewellyn similarly observed in justification of the rules against solicitation: "that fraud in essence goes far beyond perjured claims or mishandling of funds. It hooks up intimately with solicitation. And solicitation indeed engenders fraud in the claim, as when real injuries, though little, are made huge in court. And solicitation is frequently itself a semi-fraud, as when routine payments already in process from some government office are made to appear needful of expert advice — on contracts for half of the payment as a fee" Llewellyn, *Jurisprudence* (1962), p. 252.

The rules against advertising are not founded on a particular prejudice against price advertising. They are founded upon a central ethical insight: that maintenance of a sound professional relationship demands that the relationship should be one initiated by the client and not by the lawyer. The acceptability of a lawyer's advice in a society which relies on voluntary compliance induced by the legal profession for the effectiveness of its laws, likewise depends on that advice being sought by, and not thrust upon, the client. Society has an enormous interest in avoiding any alteration of the lawyer-client relationship which would deviate or render suspect the professional advice of lawyers. "The most effective realization of the law's aims often takes place in the attorney's office, where litigation is forestalled by anticipating its outcome, where the lawyer's quiet counsel takes the place of public force." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1149, 1161 (1959) quoted in *Code of Professional Responsibility*. Canon 7 n.17. This insight is not limited in its relevance to the ideals of a past time. On the contrary, a sensitive and perceptive discussion of contemporary legal ethics concludes:



"I argue in this essay that is not only legally but also morally right that a lawyer adopt as his dominant purpose the furthering of the client's interest — that it is right that a professional put the interests of his client above some idea, however valid, of the collective interest, I maintain that the traditional conception of the professional role expresses a morally valid conception of human conduct and human relationships, that one who acts according to that conception is to that extent a good person. Indeed it is my view that far from being a mere creature of positive law, the traditional conception is so far mandated by moral right that any advanced legal system which did not sanction this conception would be unjust . . . How does a professional fit into the concept of personal relations at all? He is, I have suggested, a limited purpose friend. A lawyer is a friend in regard to the legal system. He is someone who enters into a personal relation with you — not an abstract relation as under the concept of justice. That means that like a friend he acts in your interests not his own or rather he adopts your interests as his own. I would call that the classic definition of friendship. To be sure the lawyer's range of concern is sharply limited. But within that limited domain the intensity of identification with the client's interest is the same . . . The lawyer does work for pay. Is there not something odd about analogizing the lawyer's role to friendship when in fact his so-called friendship must usually be bought? If the lawyer is a public purveyor of goods, is not the lawyer-client relationship like that underlying any commercial transaction: My answer is 'no.' The lawyer and doctor have obligations to the client or patient beyond those of other economic agents. A grocer may refuse to give food to a customer when it becomes apparent that the customer does not have the money to pay

for it. But the lawyer and doctor may not refuse to give additional care to an individual who cannot pay for it if withdrawal of their services would prejudice that individual. (See ABA Committee on Professional Responsibility E.C. 2-31, 2-32. Compare id. DR. 2-110 C(1)(F) with id. DR. 2110 (A)(2)). Their duty to the client or patient to whom they have made an initial commitment transcends the conventional quid pro quo of the marketplace. It is undeniable that money is usually what cements the lawyer-client relationship. But the content of the relationship is determined by the client's needs. It is not determined as a simple economic relationship, by the mere coincidence of a willingness to sell and a willingness to buy." Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer Client Relation*, 85 Harv. 1066, 1075 (1976).

This model of the professional relationship sought to be enforced by the Code of Professional Responsibility is totally at variance with the view of professional services as fungible goods implied in the activities of appellants with their demands for price advertising. Certainly it is possible, as appellants' practice illustrates, to perform personal bankruptcy filings for an advertised minimum rate of \$250.00. If the lawyer's function is conceived to be confined to providing his client with the official forms and schedules, checking them over for sufficiency, typing them up, filing the, and presenting the necessary orders, this is quite feasible. If, on the other hand, it includes also explaining to the client the consequences of such a legal process for his future employability and exploration of avoidance of its use by negotiations with creditors and efforts toward compositions and delayed payment schedules as contemplated by Ethical Consideration 7-8 of the Code of Professional Responsibility, one may doubt that use of



a uniform, tangible, advertisable rate is possible. If a lawyer's approach to the personal and family crises inherent in divorce is that contemplated by pertinent ethical standards, use of a uniform, advertisable tangible rate also becomes difficult if not impossible. "A truly great lawyer is a wise counselor to all manner of men in the varied crises of their lives when they most need disinterested advice." Vanderbilt, *The Five Functions of the Lawyer*, 40 A.B.A.J. 31 (1954), quoted in Code of Professional Responsibility, Canon 7 n.16. Only a model of the lawyer's function which conceives of him not as a professional but as a scribe can justify the practices of appellants or action of the state in permitting them. The states are not compelled to adopt such a model. Rather, they have imposed more far-reaching responsibilities on lawyers, and the prohibition of advertising of the type engaged in by appellants is plainly "necessary in order to make the regulatory act work" *Cantor v. Detroit Edison Co.*, 96 S. Ct. at 3120 (1976), if the state's efforts by a pervasive scheme of ethical regulations to impose the ethical obligations on lawyers described by Professor Fried is not to be rendered ineffective.

If this Court is to proclaim that lawyers and judges are engaged, not in providing professional services essential, as Professor Fried points out, to the preservation of individual personality, but rather in providing a tangible and standardized commodity, the bell will toll not merely for many values hitherto deemed important in our society, and for the independence of the bar, but in the end for that of the bench also, for control over the ethical standards and practices of the persons appearing before it is an essential to the maintenance of independent judicial processes.

The foundation of the rules against advertising and solicitation is plainly ethical, not economic. The

restrictions are thus not *per se* interdicted by an act in enforcement of which, as a myriad of cases recite, "motive and intent play leading roles" *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962).

These ethical and legal reasons why the existing advertising restrictions may not be deemed *per se* illegal, or otherwise illegal under the Sherman Act even if the state action exemption is inapplicable are reinforced by the insights of economic theory, some of which are sensitively discussed in the brief *Amici Curiae* of the Mountain Plains Congress of Senior Organizations at 15-16. True, there are some advocates of the views of the Chicago or Manchester School who rather sweepingly and simplistically assert that the elimination of all advertising restrictions even in the area of advertising for services will serve consumer interests; see, e.g., Posner, *Economic Analysis of Law* (1974). This insight, however, is not universally shared even by representatives of the so-called Chicago school. Thus, the late Professor Henry Simons, in his famous, and in many respects prophetic, essay entitled "A Positive Program for Laissez-Faire," far from celebrating the contribution of advertising to competition instead argued that "the strongest case can be made for heavy taxation of advertising, provided rates can be made much higher than revenue considerations would dictate." Indeed, he urged:

"It is commonplace that our vaunted efficiency in production is dissipated extravagantly in the waste of merchandising. This economic system is one which offers rewards both to those who direct resources into industries where the indirect pecuniary demand is greatest and to those who divert pecuniary demand to commodities which they happen to be producing. Profits may be obtained either by producing what consumers want or by

making consumers want what one is actually producing. The possibility of profitably utilizing resources to manipulate demand is, perhaps, the greatest source of diseconomy under the existing system. If present tendencies continue we may soon reach a situation where most of our resources are utilized in persuading people to buy one thing rather than another, and only a minor fraction is actually employed in creating things to be bought. Firms must spend enormous sums on advertising if only to counteract the expenditures of competitors; and finally all of them may end up with about the same volume of business as if none had advertised at all. Moreover every producer must bribe merchants into pushing his product, by providing fantastic mark-ups, merely because other producers are doing the same thing... In these practices of merchandising moreover one finds an outstanding incentive to combination and producer organization. Firms acting cooperatively may spare themselves the expense of competitive selling activity; and organization permits of profitable joint enterprise and building up demand for their common product, at the expense of other industry. Thus organization of competing firms tends to change the form of advertising rather than necessarily to reduce the total of such outlays; selling activities become competitive among industries instead of merely within industries; the battle of advertising becomes a battle between organized groups instead of between competing producers of similar commodities. \*\*\* While organization has little or nothing to offer by way of merchandising economies for the community, it has much to offer to the individual participants. Besides, advertising entrenches monopoly by setting up a financial barrier to the competition of new and small firms. Consequently, an appropriate remodeling of the system with respect to merchandising would do more than free wasted resources

for useful employment; it might remove one of the main factors working to destroy real competition in industry." Simons, *A Positive Program for Laissez-faire in Economic Policy for a Free Society* (1948), pp. 71-72, 73.<sup>4</sup>

The earliest law review comment in the strikingly contemporary bibliography contained in appellants' brief, Comment, 81 Yale L.J. 1181 (1972), while professing the currently fashionable enthusiasm for removal of advertising restrictions, candidly concedes:

"Study of the economic implications of advertising is still in its infancy. Only a few statistical studies have been made of the existing data on advertising and they have not all yielded the same result. See e.g. Mann, Henning and Mehan, Advertising and Concentration: A Preliminary Investigation, 16 J. Industrial Economics 34 (1967) (Advertising expenditures positively correlated with seller's concentration); Telser, *supra*, note 84 (Advertising expenditures do not correlate with industry's concentration)... The books on the economics of advertising are primarily the summaries of the opinions of others... A further word of caution is in order. The economic studies which have been done by Telser and others deal mainly with industries which make physical products rather than with service industries such as law. Although advertising and solicitation are engaged in by some other professions... no empirical studies have been done on the impact of advertising on the professions." Comment, 81 Yale L.J., at 1207 n.161 (1972).

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<sup>4</sup>Certainly, there is force in the observation that the economic productivity of society as a whole may not be enhanced by the diversion of resources to legal services that may result from unrestrained advertising.



The note also quotes J. Bakman, *Advertising and Competition* (1967) as follows:

"Claimed anti-competitive effects of advertising may be summarized as follows: (1) a large company has the power of a large purse, which enables it to spend substantial sums on advertising, particularly to implement varying degrees of product differentiation which enables a company to preempt part of a market; (2) advertising may create a barrier to new firms entering an industry or a product market; (3) the result is high economic concentration; (4) because of their protected position and because of product differentiation these firms can charge monopolistic prices which are too high. Moreover, they must recover the cost of the advertising by charging higher prices; (5) high prices in turn result in excessively large profits."

Other economic writers have engaged in similar observations. Passionate enthusiasm for the blessings of advertising is not reflected in the following passage in an introductory economic text by two writers whose devotion to free market principles is unquestioned:

"Sales promotion implies increased expenditures on such items as advertising, salesmen, free samples and prizes. It may either increase the demand for a general product or attract existing demand to a given variety of this product. Once one seller has embarked on promotion, rivals must presently follow suit. For the long run, it seems fair to assume that the firms that stay in business hit on about equally effective and costly methods of promotion. A large class of sales promoters is built up. Their stipends, as well as other outlays for promotion, go into the costs of products and are paid by purchasers. The main question is whether the buyers get their money's worth. Some of the

cost goes for education. Consumers cannot satisfy existing wants sufficiently unless they can compare different means of satisfaction. They are also handicapped in developing better wants if they have no convenient way of learning about new products. On the other hand, sales promotion devotes no small amount of our limited resources to fostering misinformation. From the point of view of the sellers, the results are uncertain. Rival effort may nullify each other. Buyers may become too sophisticated to be deceived. Buyers may be led to shift patronage to one variety from an equally good one. The effects of 'high powered promotion' are more clear from the public point of view. In part the resources are merely wasted in vain appeals. In part they are worse than wasted. Many people are induced to buy what they do not really want or to want what they cannot buy. And all must endure incessant exhibitions of bad taste." Knight and Hines, *Economics: Introductory Analysis of the Level, Composition and Distribution of Economic Income* (1954), p. 452.

Notwithstanding the agnosticism as to the economic effects of their desired reform professed by the authors of the Yale note, a large and influential economic school led by Professors Edward Chamberlin and Joan Robinson has advanced over the course of the last 50 years theories of imperfect competition stressing the barriers to entry imposed by the availability of expenditures for advertising. The work of the Trade Practice Conferences organized by the Federal Trade Commission in developing voluntary industry agreements to avoid forms of advertising, many not in themselves fraudulent, was founded for many years on acceptance of the premises of this influential school of economic thought, which finds its reflection, as previously noted, in the *Brief of Amici Curiae* The



Mountain Plains Congress, et al. This school tends to sharply differentiate between informational price advertising which it deems desirable and product differentiation advertising which it deems economically questionable. But certainly neither the Constitution nor the Sherman Act can be manipulated to invalidate state regulations interdicting the first while permitting them to continue to prohibit the second. Particularly is this so since product differentiation advertising, if anything, partakes of a more significant ideological content than price advertising. A rule which would prohibit it while permitting price advertising would require extraordinary controversion of the First Amendment. If the state action limitation on Sherman Act liability were disregarded, the consequences for virtually all forms of state economic regulation would reverse the upshot of 100 years of constitutional history. *Nebbia v. New York*, 291 U.S. 502 (1934), has long since doomed the notion that state governments are not entitled to regulate matters of price. The revival of the old economic activism under a new guise would not be an attractive phenomenon.

The blurry nature of the desired distinction between "good" and "bad" advertising is manifest. Any attempt at such a distinction would result in the erosion of all controls and any effort to completely free advertising from restrictions will result in conduct manifestly inconsistent with important ethical purposes which the states have a right to nurture. Indeed, the fragmentary harbingers of such a future before the Court as exhibits in the Arizona case and appendices to this brief (Apps. A and B) — written while their authors have every reason to be on their best behavior — amply suggest the undermining of ethical precepts which would ensue if legal advertising is permitted. What becomes of traditional notions of lawyer responsibility to the client when lawyers, such as those in the Arizona case, are

permitted to proclaim that their representation in divorces is confined to uncontested cases (T. 61), and that they rid themselves of cases if any difficulty crops up (T. 63)? What of the advertising of "name changing" services involving uncontested proceedings which could as well be carried out by a layman with the advice of a court clerk? What of the advertising by their Maryland counterparts of contingent fee services in social security and unemployment insurance cases, notwithstanding the protective provisions of the Maryland unemployment insurance law, Article 95A §15B that "no . . . counsel shall either charge or receive for . . . services more than an amount approved by the Board of Appeals. No person, firm or corporation shall solicit the business of appearing on behalf of persons claiming benefits or shall make it a business to solicit employment for another in connection with claims for benefits under this article." What becomes of the requirement of 42 U.S.C. §406 that attorneys' fees in social security cases be individually determined by courts and administrators with a ceiling of 25% of the total recovery? If a flood of advertising of the type present in the Arizona and Maryland instances is unleashed by a decision of this Court, is it possible to seriously believe that the policies of such statutes can long be maintained or fulfilled given the fact that there would be several hundred thousand separate entities which would possess the right to advertise in what is now a conspicuously decentralized profession.

Of course, it is urged and recognized that one effect of unlimited advertising will be an enhanced degree of concentration in the profession, since new individual practitioners will find it difficult to engage in advertising. If one believes in the premise of the *Associated Press* case that truth comes from a multitude of tongues, it is difficult to consider that this

consequence of the extravagant antitrust claims put forward would be consistent with the policies of the First Amendment which appellants also claim to embrace. The economic rationalization of industries producing and distributing goods has, as Justice Brandeis reminded us, its own social cost. However, these are nothing compared to those that would follow if a legal profession becomes highly concentrated and if its neophytes are denied the option of starting their own practices in favor of alliance with the local equivalent of H & R Block or of "Painless Parker," the celebrated grantor of California dental franchises.

### CONCLUSION

The First Amendment claims here asserted are founded on no tenable political theory and would have disastrous consequences for virtually all forms of public regulation if taken seriously. The antitrust claims can be sustained only by embracing interpretations of law equally antagonistic to federalism, to First Amendment rights and to sound economic judgment. The organized bar does not contend that existing rules are immutable. But to the extent that they may operate to discourage resort to law save by those determined to invoke its processes, their postulate is rational and compelling. Ours is a loose grained legal system which teaches by example, not by minute regulation. Not every wrong must be righted nor every potential client represented for it to fulfill its central purpose of ordering a free society. Individuals may pay taxes without legal advice and without a decision of the United States Court of Appeals affirming a judgment of the Tax Court in favor of the government. Individuals may comply with contracts bearing their signature, even contracts of adhesion, in advance of a mandate of the highest court

of a state enforcing them in the individual case as in conformity with the Trust in Lending Act. Individuals may refrain from suing for injuries sustained in falls in the street either because they do not know of the liability of municipalities or are insufficiently agitated about their injuries to seek the advice of counsel.

All civilized societies regulate the use of legal process. All regard it as a necessary means of allowing a society to function while preventing it from becoming totalitarian. As Chief Justice Burger observed in his opening remarks to the American Law Institute in 1970:

"Our legal structure is perhaps somewhat more relaxed than the legal systems in many other countries. If this has its negative aspects, it also affords us a resiliency to tide us over and to enable us to meet any crisis as it arises. We respond slowly, but that is the nature of a democratic society."

To the extent that the issues raised in these cases involve legitimate criticisms of the status quo, they will evoke a response. But that response must be determined by the assessment of the claims and demands on their merits by the legislatures and state courts with authority over them after full and free discussion. Thus, we believe the appropriate attitude of the organized bar to the transgressors of established rules who appear before this Court to be that expressed by Judge Learned Hand in an address to the American Law Institute of 1929:

"To substitute the right of each one to make his own estimate is to invite chaos to preside. City and country, ward and parish, block and village, house and house will give different returns til the speech of the men of Babel would seem unanimous. In this as in so much else we must be



content to accept some convention and hope that it will not bear too heavily to provoke rigid analysis. It is besides the point to argue that in the past there have been laws which fell into the scrap basket. In large part this is not more than an index to the immaturity of the society in which they prevail, of its incapacity to adapt itself to civilized life. To raise it into a part of the theory of government indicates our own incapacity to understand the conditions of social existence.

"Mind, I am not speaking of how far an individual owes allegiance to every part of existing law. Tyranny is tyranny no matter what its form; the free man will resist it if his courage serves. But let him beware that in his rebellion he lay hold of some fundamental affirmation of his spirit. There may be a heavy price for him and there will certainly be for the community in which he lives if he succeeds in drawing along others with him. Of the contrivances which mankind has devised to lift itself from savagery, there are few to compare with the habit of assent, not to a factitious common will, but to the law as it is. We need not go so far as Hobbes though we would do well to remember the bitter experience which made him so docile. Yet we can say with him that the state of nature is 'short, brutish and nasty' and that it chiefly differs from civilized society in that the will of each is by habit and training attuned to accept some public fixed and ascertainable standard of reference by which conduct can be judged and to which the main it will conform... We welcome any changes, in proper season and in proper place we shall urge and demand them. But we will not forget that we have a duty perhaps even greater than that, a duty to preserve." Hand, *Is There a Common Will?* in *The Spirit of Liberty* (1952), pp. 47, 54-55, 56.

The judgment of the Supreme Court of Arizona should be affirmed.

Respectfully submitted,

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December 30, 1976



**APPENDIX A**

**C16 • • THE SUN, Thursday, September 9, 1976**

**THE LEGAL CLINIC**  
of Cawley-Schmidt & Sharrow, P.A.

Because of the need of the community for a new approach to the availability of legal services at low affordable fees, the first **LEGAL CLINIC** on the East Coast has received an overwhelming acceptance by the Baltimore community.

The next office will open on or about October 1st at

**724 DULANEY VALLEY RD.**

**In the DULANEY VALLEY**

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Applications are being accepted from qualified, experienced lawyers, paralogists and legal secretaries to staff this and other offices, soon to be opened in other communities of the greater Balto. area.

If you are sincerely interested in providing quality legal services, and applying your skills and knowledge to the practice of law as a community service, apply by sending a resume to the

**LEGAL CLINIC OF CAWLEY-  
SCHMIDT & SHARROW, P.A.**

**2117 Eastern Ave.**

**Balto., Md. 21231**

*or call*

**342-3000**

**APPENDIX B****A MESSAGE TO OUR CLIENTS**

**THE LEGAL CLINIC**  
of  
**Cawley, Schmidt,  
& Sharrow, P.A.**

2117 EASTERN AVENUE  
BALTIMORE MARYLAND 21231  
(301) - 342-3000

**ADMINISTRATIVE OFFICES**  
303 E. FAYETTE STREET  
BALTIMORE, MARYLAND 21202  
(303) - 685-7744

*WE ARE HAPPY to welcome you to the LEGAL CLINIC of Cawley, Schmidt & Sharrow, P.A. Since the CLINIC is a new concept in the extension of legal services, we hope you will take the time to read this pamphlet and acquaint yourself with us.*

*If you have any questions, please ask. We are at your service.*

**WHAT THE LEGAL CLINIC IS**

The LEGAL CLINIC of Cawley, Schmidt & Sharrow, P.A. is the first of its kind in the Eastern United States. In our society of high priced law firms and no-cost legal aid programs, only the rich and the poor have ready access to lawyers. People in the largest sector of our

society — the middle income — must either do without lawyers and give up their rights or, when lawyers cannot be avoided, pay much more than they can afford. The LEGAL CLINIC has, for the first time, adopted a common sense approach to providing high quality, low-cost legal services.

**HOW THE LEGAL CLINIC WORKS**

The LEGAL CLINIC has copied much from medical clinics. It is a system of combining the efforts of staff and non-resident attorneys, and paralegal counselors.

Attorneys whose private practices are devoted primarily to a particular area of the law, such as criminal, bankruptcy or administrative matters will devote a portion of their time to handling cases for the LEGAL CLINIC in their area of expertise.

In addition, in much the same way as medical clinics use nurses, the LEGAL CLINIC makes extensive use of paralegal counselors, specially trained to assist the attorneys on a case by case basis. They are able to perform many of the tasks which in most law firms are reserved for the attorneys. However, they do not give legal advice and every client of the LEGAL CLINIC will be individually counseled by an attorney.

Carefully planned and detailed systems have been devised so that with the combined efforts of attorneys and paralegal counselors, the LEGAL CLINIC can operate with the utmost efficiency and give the highest quality services at substantially reduced prices.

## COUNSELING

A special feature of the CLINIC, especially helpful in consumer matters, is its low cost counseling service. Many problems can be resolved by an explanation of your rights, or by advice as to where to go and what to say to enforce your rights yourself.

### SOME SPECIAL SERVICES

**SMALL CLAIMS:** Many people are quite capable of handling their own cases once they are aware of the procedures and their rights. The CLINIC will give personalized instruction on how to pursue, and how to defend, a small claim in District Court.

**TRAFFIC TICKETS:** The cost of a traffic ticket can sometimes be very high in terms of insurance or loss of a driver's license, but many people don't know how to go about defending themselves. The LEGAL CLINIC offers counseling on the preparation and defense of Traffic Court cases.

**SOCIAL SECURITY CLAIMS:** People who are disabled and think they are entitled to Social Security often give up after an initial rejection because they don't know what to do next or don't realize they may still be entitled to benefits. The LEGAL CLINIC will take such cases on a contingent fee basis.

**UNEMPLOYMENT INSURANCE CLAIMS:** "When a person quits a job for a "good cause" he is entitled to unemployment insurance if he is unable to find another job. Yet sometimes his claim is erroneously turned down. The LEGAL CLINIC will represent him/her in an appeal on a contingent fee bases.

**PURCHASE OF HOME:** For most people their home is the most important purchase they will ever make. The LEGAL CLINIC will review complicated escrow and purchase papers.

## THE LEGAL CLINIC FEES

The LEGAL CLINIC, of Cawley, Schmidt & Sharrow, P.A. charges no fee for an initial conference. Thereafter the fee, if any, depends upon a number of factors. The fee structure has been kept as simple as possible. The following are some examples of fees (not including court costs).

1. *Dissolution of marriage in which there is no support, children or property involved and which is not contested.*  
\$150.
2. *Uncontested dissolution of marriage with property settlement agreement.*  
(Minimum) \$250.
3. *Bankruptcy – individual, no assets.*  
\$225.
4. *Personal Injury – 25% if settled prior to suit, 33 1/3% thereafter.*
5. *District Court hearings. (Criminal & Civil)*  
\$125.
6. *Simple Wills*  
\$35.
7. *Counseling (per consultation)*  
\$20.
8. *Incorporations*  
\$175.



THE LEGAL CLINIC WILL PROVIDE  
MORE DETAILED FEES FOR PARTICU-  
LAR SERVICES UPON REQUEST.

\* \* \*

Fees may be paid by cash, check  
MASTERCHARGE  
or  
BANKAMERICARD

### THE LEGAL CLINIC'S CASES

The LEGAL CLINIC of Cawley, Schmidt & Sharrow,  
P.A. will handle most legal problems such as the  
following:

- DOMESTIC RELATIONS
- CUSTODY
- CRIMINAL
- CONSUMER
- PERSONAL INJURY
- BANKRUPTCY
- LANDLORD - TENANT
- JUVENILE
- ADOPTION & GUARDIANSHIP
- DISTRICT COURT
- TRAFFIC TICKET
- SOCIAL SECURITY CLAIMS
- UNEMPLOYMENT INSURANCE CLAIMS
- DISABILITY CLAIMS  
(WORKMEN'S COMPENSATION)
- NAME CHANGE

- DRIVER'S LICENSE  
(DMV HEARINGS)
- PURCHASE OF HOME  
(REVIEWING OF PAPERS)
- SIMPLE WILLS

If you want to know whether we handle your type  
of case, please ask.

Please call for an appointment. We are open some  
evenings and Saturdays.